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CONVEYANCER'S NOTEBOOK

Report of the Committee on Local Land Charges.—The Committee on Local Land Charges have now issued their report (Cmd. 8440, price 2s. 6d.) which is of interest to practitioners not merely for what it recommends but also for its exposition of the existing law. In particular, all the additional entries made pursuant to Acts subsequent to the Land Charges Act, 1925, are set out together with a note on the effect of the non-registration in each particular case. There are some very helpful observations on preliminary inquiries and in Appendix D there is a review of additions to the register proposed by various witnesses. These suggestions may prove of great assistance in considering what inquiries should be made with regard to matters not at present registrable.

VENDOR'S OBLIGATION OF DISCLOSURE.—In *Re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, it was held that a resolution to prepare a town planning scheme need not be disclosed by a vendor to a purchaser prior to contract on the ground it was not an incumbrance. Eve J. also said that even if it had been an incumbrance, the vendor would have been under no obligation to disclose it as section 198 of the Law of Property Act, 1925, provides that registration under the Land Charges Act of any instrument or matter required or authorised to be registered shall be deemed to constitute actual notice of the instrument or matter and of the fact of such registration to all persons and for all purposes

connected with the land affected. The Committee appear to take the view that the present law is that a vendor need not disclose local land charges, for it states: "It can safely be said, however, that [section 198] relieved the vendor to some extent from his obligations to disclose, or at any rate from some of the consequences of failure to discharge them; and that the more matters are required to be registered the more relief he gets." On this view of the law, the Committee does not propose any alteration in the obligation of disclosure on the part of vendors.

With respect, we think the view of the law taken by Eve J. and the Committee wholly misconceives the purpose of section 198. That section deals with the equitable doctrine of notice and is as applicable to ordinary land charges as to local land charges. So far as we are aware, it has never been suggested that a vendor need not disclose ordinary land charges merely because they are registered. The purpose of registration is to fix a purchaser with notice of an incumbrance or charge at the time that he takes a conveyance so that the person entitled to the benefit of the incumbrance or charge can enforce it against him. If the incumbrance or charge is registered, the purchaser will ascertain this before completion and, unless he purchased subject to it, will require the vendor to remove the defect or pay compensation.

The Committee take the view that, as a purchaser in practice nearly always searches before contract, there is no reason for the vendor to make disclosure, and they dismiss the difficulties arising on sales by auction in a rather off-hand fashion—If a prospective purchaser is professionally advised, he is already in a position to make a search beforehand; if he is not professionally advised, even if he had a certificate of search before him, he would probably not be able to interpret the significance of its contents without assistance. The Committee had already pointed out that plans are often required before searches can be made and it seems therefore doubtful whether a prospective purchaser, even if professionally advised, could make his searches in all cases.

Whatever view may be taken of the present law with regard to disclosure, future legislations should make the position quite clear and the matter should not be left to await the determination of the courts.

EFFECT OF NON-REGISTRATION.—If a local land charge is not registered, it is void as against a purchaser for money or money's worth of a legal estate in the land affected thereby. In the case of matters registrable under Acts subsequent to the Land Charges Act, 1925, the effect of non-registration varies and in some cases

the purchaser is affected even though the restriction or incumbrance is not registered. The Committee point out that in many cases, even where some matter is not registered, the position can be rectified and a purchaser bound by the making of a fresh order or the service of another notice or instrument. In other cases where a prohibition or restriction is unenforceable against a purchaser the result may be to frustrate some project of great public importance. They therefore recommend that failure to register a charge should not result in the avoidance of the charge but that a purchaser who has suffered loss should be entitled to be paid compensation, subject to a proviso that the authority entitled to the benefit of the charge should, with the approval of the appropriate tribunal, be enabled to cancel the charge and thus avoid payment of compensation. It seems to us to be inevitable that at any rate some charges should be treated in this way, but whether it is necessary to extend the principle to all charges is a matter open to question.

Amalgamation of Registers.—The Committee recommend that outside London the county registers should be absorbed by the district registers, but in London the present system should continue. The reason for drawing a distinction is that in London there are serious practical difficulties in the way of closing either the borough or the county registers. Even outside London it would still be necessary to make additional inquiries of the county council in many cases. The Committee also recommend that the registers should come under the supervisory jurisdiction of the Lord Chancellor, who would exercise his functions through and on the advice of the Chief Land Registrar who is, of course, responsible for the Land Charges Registry. It is interesting to note that the Chief Land Registrar thought that, if the title to all land were registered, it would be quite feasible to amalgamate the local land charges registers with the registers kept under the Land Registration Acts. Whether it would be possible to amalgamate such registers at an earlier date by using the powers conferred by the Land Registration Act, 1925, to set up provincial registers is not discussed.

Delay.—A short paragraph is devoted to complaints of delays in issuing an official certificate of search and it was suggested that there ought to be a statutory requirement that the certificate should be issued within a fixed time. With respect, we would point out that the Land Charges Act, 1925, s. 17, already provides that the registrar shall "thereupon," *i.e.*, upon the lodging of the requisition for a search, make the search and issue the certificate. The

difficulty in the way of a practitioner is that there does not seem to be any practical mode of enforcing this obligation.

REGISTRATION OF ADDITIONAL MATTERS.—There is considerable difference of opinion over the question what should be registered. Some witnesses would like all matters at present the subject of inquiries to be registrable. The Committee point out that this is quite impracticable as many matters the subject of inquiries are in their nature not capable of registration. The Committee have indicated, with their reasons, what additional matters should be registered. In particular, they recommend that in the case of compulsory purchase registration of its possibility should be effected at the earliest practicable date.

MISCELLANEOUS.—There are a number of miscellaneous recommendations dealing with the administrative aspect of registration. One recommendation is that in the case of local land charges priority notices should be abolished and a purchaser should be bound by anything registered within 14 days of a certificate of search. Mr. R. Marshall does not agree with this recommendation, and there seems to be little in its favour. There would probably be no objection to the period of time for completion after the issue of an official certificate being reduced from 14 days to, say, 4 days, but surely it ought to be possible for a purchaser or mortgagee to complete knowing that nothing has been added to the register without his knowledge. We must confess, however, that the point seems largely academic as in practice most solicitors only search before contract and not again immediately before completion.

Conditions as to Change of Surname.—It has been a commonplace for very many years for a testator who is the last of his line, to annex to gifts a condition that the donee shall take his family name; and one might well think the practice harmless enough. In *Re Fry* [1945] Ch. 348, Vaisey J. held such a condition annexed to a gift to a woman to be invalid (*inter alia*) on the ground that it was contrary to public policy, affecting, as it did, her position on marriage. He pointed out that the precedent books show that the right of a name clause where the beneficiary is or may become a married woman is to place the obligation not upon her alone but upon her husband as well, and he qualified the principle he was enunciating, saying (at p. 353): "There may be

circumstances in which [a name clause] could with absolute propriety be applied to a woman: if, for example, she were the sole surviving representative of some notable family."

In *Re Lewis' Will Trust* [1951] 2 T.L.R. 1032, Vaisey J. took the matter further. Again he had before him a name clause applicable to a spinster, this time the form having come from Key and Elphinstone's Precedents in Conveyancing, 14th ed., vol. 2, p. 735. The clause provided that every beneficiary should within one year of becoming entitled assume the surname of Stewart either alone or with her or his family surname, " but so that the name of Stewart shall be the last and principal surname," and should not " at any time afterwards disuse such surname." This form of clause is of respectable age, examples being found in the 1834 edition of Bythewood and Jarman's Precedents in Conveyancing, and the 1863 edition of Hayes and Jarman's Forms of Wills. Nevertheless, Vaisey J. found the clause so uncertain in its operation as to be bad. First, the phrase " last and principal " were uncertain as, if it were not tautologous, he did not know the import of the word " principal " in the context. Secondly, the word " disuse " appeared to him to have a different meaning from the expression " discontinue the use of," the former referring to a continuous process, the beginning of which might be very difficult to identify, the latter indicating an overt act. In addition to these grounds the learned judge held that the clause was void on the ground of public policy, following *Re Fry*.

One is tempted to speculate whether a practitioner would find it easier to understand the exact scope of the principle of public policy enunciated than the intentions of the draftsman of the clause before the court in *Re Lewis' Will Trusts*. It is not a very satisfactory state of affairs that wills, above all other classes of documents, should give rise to so many difficulties of construction, and that a testator, even with professional assistance, so often fails to express sufficiently clearly provisions that in essence are perfectly simple.

Covenant against Assignment and Surrender of Lease.—A form of clause enabling a lessee to surrender a lease upon submitting an offer by a satisfactory proposed assignee of the lease, designed to enable a lessor to decide in every case whether to accept a surrender rather than to permit assignment, appeared in *The Conveyancer*, vol. 15, p. 552. This form was designed to get over the difficulties created by *Re Smith's Lease* [1951] 1 All E.R. 346. A form covering much the same ground, but drafted before this decision,

appeared in *The Conveyancer*, vol. 14, p. 465. A reader has asked whether we consider the earlier precedent still to be effective.

In *Re Smith's Lease* a lease contained a covenant against assignment without consent, with a proviso that the lessor should be deemed not to have unreasonably withheld his consent to assignment where he offered to accept a surrender of the lease. The Landlord and Tenant Act, 1927, s. 19 (1) (a), provides that, where there is a covenant against assignment without the lessor's consent, it is subject to a proviso that the consent is not to be unreasonably withheld, notwithstanding any express agreement to the contrary. The court held that the question whether consent is unreasonably withheld is one for the court and cannot be taken out of its hands by the parties' agreement; the parties cannot deem consent to be not unreasonably withheld if it is so in fact. The proviso was therefore ineffective.

It seems a reasonable inference that the section was principally designed to give security to a tenant of business premises who wished to sell his business, although it applies to all types of leases, except agricultural ones. At any rate it is clear that Parliament has no objection to an absolute covenant against assignment; nor does it seek to secure that tenants shall be entitled to reap capital profits on sale of their leasehold interests, for it has prohibited them from doing so in certain cases by the Landlord and Tenant (Rent Control) Act, 1949. In the case of rent-controlled premises the courts have shown no tendency to prefer the tenant to the landlord when the right to assign is in issue. Accordingly there seems to be no ground for supposing that the courts will seek to extend section 19 (1) (a) beyond its apparent scope.

In the earlier of the precedents under discussion the tenant is absolutely prohibited from assigning but is entitled to offer to surrender his lease to the landlord. Until the landlord decides to refuse the offer, no question of assignment can arise. If the offer is refused the second part of the clause comes into operation. This part is drafted in the usual form and prohibits assignment without the landlord's consent. If a clause were to prohibit assignment absolutely for the first five years and only thereafter without the landlord's consent, it would be difficult to argue that section 19 (1) (a) rendered nugatory the absolute prohibition; and it seems to us that the position is the same where the absolute prohibition is coupled with a right to offer to surrender the lease.

We are therefore of the opinion that both precedents are equally effective and it will be for individual practitioners to decide which of them they prefer to use in the particular circumstances.

A New Legal Journal.—The Rent Restrictions Acts, the Landlord and Tenant Act, 1927, and the planning legislation have increased the necessity for professional persons, other than lawyers, such as surveyors, architects and estate agents, to acquire a working knowledge—and, indeed, in some cases they acquire a disconcertingly specialised knowledge—of some aspects of property law. *Current Property Law*, the first issue of which appeared in January of this year, seeks to cater for such professional persons; it is a legal journal not for lawyers. It is published monthly by Sweet & Maxwell, Ltd., with an annual subscription of £2 2s.

The first issue contains an 18-page article by W. A. Leach, F.R.I.C.S., on valuation aspects of goodwill. When claims are made for new leases or compensation for goodwill under the Landlord and Tenant Act, 1927, expert evidence on the value of goodwill often has the air of being designed to support arbitrary figures put up by the tenant or by the landlord, and surveyors should find the article of considerable help in preparing evidence on the subject which will stand up to thorough testing. The Reports of Cases and the Law Finder, which will probably be the touchstone of the journal's success or otherwise, are excellently done. The journal is most attractively printed and got up and we wish it every success.

Section 46 (1) *of the Finance Act*, 1950, *and Special Powers of Appointment.*—A form of settlement by a father on his children was recently published in *The Conveyancer* (vol. 15, p. 569), which reserved a power of appointment to the settlor in favour of children and issue. It is clear that the settled property would be subject to estate duty on the death of the settlor if he failed to survive its execution for a period of five years. By a note to the special power the point was raised whether an exercise of the special power by the settlor would amount to a " disposition " in favour of a relative within section 46 (1) of the Finance Act, 1950, which has been substituted for the original section 44 (1) of the Finance Act, 1940. If it should amount to such a disposition, estate duty would be payable as on a gift in respect of any appointment for five years after the date of its execution.

One of our readers has written questioning whether the exercise of the special power of appointment would fall within section 46 (1) of the Act of 1950. He writes: " It has been our view that an exercise of such a power would not be such a disposition if the settlement is drawn so that no interest is retained to the settlor.

The settlor would have parted with all his interest in the property and the exercise of the power would not 'dispose of' the funds which have already been fully disposed of to the trustees. There would be no benefit to the settlor of a money value."

Anyone trying to discover whether a transaction is within the provisions of a taxing section is faced with two difficulties: first, he has to try to understand what the relevant sections mean and then he has to consider the practice of the Inland Revenue Commissioners, who do not always exact the full tax to which they are entitled and, if it is not their practice to do so, how far that present practice can be relied on. It seems on a strict interpretation of the relevant sections that probably the exercise of a special power of appointment in favour of a relative amounts to a disposition. On the other hand, it does not appear that the practice of the Commissioners at the present time is to exact tax in such circumstances. Section 46 (1) of the Act of 1950 provides: " (1) Any disposition made by the deceased in favour of a relative of his shall be treated for the purpose of para. (c) of subsection (1) of section 2 of the Finance Act, 1894, as a gift unless (a) the disposition was made on the part of the deceased for full consideration in money or money's worth paid to him for his own use of benefit; or (b) the deceased was concerned in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only; and references to a gift in the other enactments relating to estate duty (including this Part of this Act) shall be construed accordingly. . . ." The subsections which follow do not throw any further light on this question.

There is no doubt who are relatives for the purpose of the section. They are defined in section 44 (2) of the Finance Act, 1940, as being the wife, husband, father, mother, child, uncle or aunt of the deceased and the issue of any such persons, and the other party to a marriage with such persons. " Children " and " issue " include illegitimate and adopted children.

The real difficulty in applying section 46 (1) of the Act of 1950 is in determining what amounts to a " disposition " made by the deceased. For the purpose of the original section 44 of the Act of 1940 and, therefore, also for the purposes of section 46 (1) of the Act of 1950, some light is thrown on the meaning of disposition by section 58 (4) of the Act of 1940, which provides that references to a " disposition " shall include references to a disposition made by a person jointly or by another at his direction, and in section 59 " disposition " is defined as including " any trust, covenant, agreement or arrangement, whether made by a single operation or by associated operations."

The word " disposition " has, of itself, a very wide meaning apart from the provisions in the Act of 1940, which are intended to extend the ordinary meaning. In *Duke of Northumberland* v. *Att.-Gen.* [1905] A.C. 406, Lord Macnaghten stated that " disposition " in the Succession Duty Act, 1853, was intended to comprehend every conceivable mode by which property could pass, whether by act of parties or by law, and in *Parr* v. *Att.-Gen.* [1926] A.C. 239, Lord Carson said that in the Finance Act, 1894, " disposition " meant the effective disposition under which the property passed.

The question is whether a special power of appointment can be said to be " an effective disposition under which the property passes." It would seem that the exercise of a special power of appointment is a disposition. It was held in *Re De la Bere's Marriage Settlement Trusts* [1941] 1 Ch. 443 that where an instrument creates a special power of appointment and a later instrument exercises that power, the interest created by the exercise of the power arises under the later instrument, for no such interest existed until the power was exercised so as to create it. In this case under a settlement of 1938 a settlor empowered his trustees to appoint settled funds in favour of M. B. and her two sisters, and their issue as the trustees in their absolute discretion should determine. The trustees exercised the power in favour of M. B. and her sisters in equal shares and declared that each share should be exempt from the covenant to settle after-acquired property contained in the marriage settlements of the three appointees.

M. B. asked whether the property appointed to her was caught by the covenant to settle after-acquired property contained in her marriage settlement. The answer to that question depended on whether " the instrument under which the property was required " was the appointment of 1941 or the settlement of 1938. Simonds J., as he then was, said: " I think that it is reasonably clear that the instrument under which the plaintiff acquired her share of the trust fund was the deed poll of appointment under which the power was exercised." He considered that it was established by the decision of Crossman J. in *Re Dickinson's Settlement* [1939] Ch. 27, founded on the earlier cases of *Re Rush* [1922] Ch. 302, and the *Duke of Northumberland* v. *Inland Revenue Commissioners* [1911] 2 K.B. 343, that where there was an instrument creating a power, and a later instrument exercising that power, the interest created by the exercise of the power arose under the later instrument for, in fact, there never was such an interest until the power was exercised so as to create it.

Those decisions appear to establish that where there is a special

power of appointment in favour of children or issue, and in default of appointment the children take, should an appointment be made in favour of grandchildren the interest of the grandchild arises out of the exercise of the special power, and it would seem according to the ordinary meaning of the term that the exercise of the special power is a disposition.

There appears to be no reason why when a settlement is made more than one " disposition " should not result. There will always be the original disposition by the settlor. It would seem that where beneficial rights are varied by the exercise of powers, rights which are brought into being by such exercise result from a disposition.

On the other hand, Farwell J. held in *Re Hoff* [1942] 1 Ch. 298 that in the Legitimacy Act, 1926, s. 3 (1), the provision that a legitimated person shall be entitled to take any interest " under any disposition coming into operation after the date of legitimation " did not authorise the exercise of a special power of appointment conferred by a settlement made before the legitimation of a child in favour of the child after legitimation. The learned judge held that the " disposition " within the meaning of the Legitimacy Act, 1926, was the original settlement and not the special power exercised under it.

If the exercise of a special power of appointment is a disposition it is caught by section 46 (1) of the Act of 1950, for it would not be possible to contend that the appointment was made by the settlor in a fiduciary capacity since the Court of Appeal held in *Re Mills* [1930] 1 Ch. 654, that a special power is not a power in the nature of a trust or a power coupled with a duty.

It is, however, doubtful whether in fact the exercise of such a special power by a settlor after the expiration of the five-year period would be treated by the Inland Revenue Commissioners as a disposition. It is stated in Hanson's Death Duties, 4th Cumulative Supplement to the 9th edition, p. 130, that in practice the Commissioners concede that a disposition which the deceased made in a purely fiduciary capacity imposed by his own disposition would not be treated as a gift provided it does form part of an arrangement whereby he secures a benefit. An advance to a related beneficiary made by the deceased as trustee out of funds settled on the beneficiary by him outside the statutory period in which he had no interest is in fact at present not charged to duty.

Until the matter has been the subject of a judicial decision, it seems that there are sufficient doubts on the true position for it to be advisable for a settlor to hesitate before exercising a special power in favour of a relative unless the circumstances render this

highly desirable in the interests of the family as a whole. The decision in *Re Duke of Norfolk* [1950] 467 shows that the Inland Revenue Commissioners are always liable to change their practice, even although in the past they have invariably claimed less than that to which the statute entitles them.

B. A. B.

Registered Land and Land Charges.—In commenting on Mr. Neville Gray's report recommending the extension of compulsory registration to Surrey, we said that it was far simpler to register a land charge in the case of unregistered land than in the case of registered, for the person seeking to register in the former case does not need the assistance of the estate owner as in the latter; and the type of estate contract considered in *Turley* v. *Mackay* [1944] Ch. 37, would not appear to be registrable at all in the case of registered land. The Chief Land Registrar writes:

"This statement ignores the provision of subsection (2) of section 59 of the Land Registration Act, 1925, which provides:—

> 'Registration of a land charge (other than a local land charge) shall, where the land affected is registered, be effected only by registering under this Act a notice caution or other prescribed entry.'

"Where the estate owner does not concur in the registration of a land charge, the person entitled to the benefit of it can register a caution *without* his concurrence. Furthermore, subsection (1) of section 54 of the Land Registration Act provides that:—

> 'Any person interested . . . howsoever in any land or charge registered in the name of any other person may lodge a caution.'

Therefore, in the case of registered land there would be no difficulty in protecting the type of estate contract considered in *Turley* v. *Mackay* by the registration of a caution where the estate owner refuses to co-operate in the registration of notice of it."

We are grateful to the Chief Land Registrar for drawing our attention to these provisions. There is, however, a great deal of difference between registration of a land charge with the estate owner's concurrence and registration merely of a caution without it, a distinction which does not obtain in the case of unregistered land. Where only a caution is registered the person registering it is merely entitled to notice of proposed dealings with the land. Furthermore, a caution has to be supported by a statutory declaration. We cannot follow how it is possible to register a *Turley* v. *Mackay* type of estate contract, covering unspecified land to be

acquired in the future, in the case of registered land, for, as we understand it, the land to be affected has to be specified in the caution.

Forestry Act, 1951.—*Felling Licences.*—We have received the following communication from the Forestry Commissioners:—

With certain exceptions, this Act forbids the felling of trees unless a licence granted by the Forestry Commissioners is in force authorising the felling.

When granting a licence, the Commissioners may impose conditions for securing the restocking or stocking with trees of the land on which the felling takes place or of other land. Normally, from three to five years after felling would be allowed for such planting or replanting. The Commissioners would require the young trees so planted to be properly maintained for a period not exceeding 10 years.

Where the land to which the conditions relate changes hands and the conditions have not been fully complied with, any enforcement action will be against the person who owns the land at the time such action is taken.

Thus the conditions attaching to a licence become a burden on the land and should be disclosed by the owner when disposing of the land to which the conditions relate.

The Harold Potter Memorial Fund.—The Old Students' Association, Laws Branch, of King's College are appealing for funds for a memorial to the memory of the late Professor Harold Potter. The memorial will take the form of the furnishing with law reports and, if possible, pictures of legal interest and other equipment of a room at the College to be named "The Harold Potter Room" for the use of undergraduates. We feel sure that some of our readers would like to be associated with this memorial. All those interested should send their contributions to the Honorary Treasurer, Laws Branch, O.S.A., c/o The Faculty of Laws, King's College, Strand, London, W.C.2.

THE REMUNERATION OF TRUSTEES

By G. Boughen Graham, Barrister-at-Law

It is becoming more and more usual to find in either wills or settlements some form of provision for the remuneration of trustees or personal representatives. Such provisions may be divided into four types, a pecuniary legacy to executors, an annuity or salary payable to the executors or trustees during the life of the trust, a power to professional executors or trustees to charge for services rendered to the trust or a power to the executor or trustee to make charges according to a specific scale. All four types of remuneration give rise to some problems which do not seem to have received the attention they deserve and it is proposed to consider each type in turn.

Pecuniary Legacy to Executors

In the normal case where the executor does in fact prove the will and undertake the duties of executorship, this type of provision does not give rise to any great difficulties so long as it is remembered that it is in fact a legacy and hence it will be lost if the executor-legatee has witnessed the will and it will, in the absence of any special direction to the contrary, abate rateably with the other pecuniary legacies if the assets of the estate are insufficient to pay them all in full.

If, however, the executor does not for any reason undertake the duties of executorship the question arises whether a legacy to him is independent of his position as executor or is conditional upon his carrying out those duties. This is, in all cases, a matter of construction, but there is a presumption that a legacy given to an executor is given to him *ex officio* and that he may not take the legacy unless he accepts the office.

The presumption is not rebutted by the fact that the legacy preceded the appointment or by the fact that, where there are several executors the legacies given to them are of unequal amounts—*Re Appleton*, 29 Ch.D. 893. The presumption may, however, be rebutted if some other motive is expressed or implied as was the case in *Bubb* v. *Yelverton*, 13 Eq. 131; there the legacy was expressed to be " as a remembrance " and it was held that the legatee was entitled although he did not prove. Or if there is a

provision that the gift is to go to the next-of-kin of the legatee if he should predecease the testator as in *Re Bunbury's Trusts* [1876] Ir.R.Eq. 408. Or if the legacy is a reversionary one as in *Re Reeve's Trusts*, 4 Ch.D. 841.

Whether this form of remuneration should be adopted depends mainly upon the type of trusts to be set up under the will. If they are likely to be of short duration, so that they will come to an end within the lifetime of the original executor, then such a provision might well be more appreciated than an annuity since income tax and surtax will not be claimed upon it. If it is adopted the conveyancer would do well to make it perfectly clear by express words whether the legacy is or is not conditional upon acceptance of the office.

Annuity or Salary to Executors or Trustees

Where this is given by will then, as in the case of a pecuniary legacy, the provision is a legacy and will have to abate if the estate is insufficient to pay all the pecuniary legacies in full. Thus in *Re Salmen*, 107 L.T. 108, the will authorised the appointment of one of the executors as manager of the testator's business at a salary. It became apparent that the estate was insolvent, and it was held that the executor's right to remuneration could only be founded upon the provision in the will : whilst such a provision was good as between the executors and the beneficiaries it could not bind the creditors of the estate and hence the executor could obtain no remuneration.

Questions may arise as to the duration of the annuity or salary and these will, of course, be matters of construction of the provision. In *Hull* v. *Christian*, 17 Eq. 546, there was a gift to W. W. so long as he should continue to execute the office of trustee under the will, and it was held that the annuity ceased when the annuitant ceased to have any active duties to perform, but did not necessarily cease upon the making of an administration order. In *Clay* v. *Coles* [1880] W.N. 145, there was an annuity "to my executors for their trouble in discharging their duties," and it was held that the executors were entitled not to an annuity for their lives but only to an annuity to continue so long as the executors had duties to perform.

A further point of construction arises as to whether such an annuity or salary is personal to the original executors or trustees or is to continue to be paid to the trustees for the time being. This again depends upon the terms of the provision, and draftsmen would do well to make the matter perfectly clear.

The incidence of estate duty upon any cessation of the annuity or change in the annuitants was considered in *Att.-Gen.* v. *Eyres* [1909] 1 K.B. 723. There was a provision whereby each trustee of a settlement was to be paid £200 per annum while acting in the trusts "by way of remuneration for their services." One trustee died, having received his annuity up to the date of his death, and a new trustee was appointed in his stead who, upon his appointment, became entitled to the annuity. The Crown claimed succession duty upon the sum of £200 per annum to which the new trustee became entitled and also estate duty upon the principal value of the capital fund yielding that annual sum. It was held that the new trustee did not become entitled to the annuity by reason of the settlement upon the death of the new trustee within section 2, Succession Duty Act, 1853, but rather by reason of his appointment as a trustee and hence that succession duty was not payable, and also that the interest which the deceased had in the property was an interest only as the holder of an office, namely that of trustee, and so was within the exception in section 2 (1) (b), Finance Act, 1894, so that estate duty was not payable.

It is surprising that no discussion is to be found upon the effect of the perpetuities rule upon the remuneration of trustees either by annuity or otherwise. Of course, where, as a matter of construction, the annuity is personal to the original trustee or executor no tendency to a perpetuity can be found. Where, however, the terms of the provision are such as to extend the benefit of an annuity to any trustee for the time being of the will or settlement it is obvious that a trustee may be appointed who was not a life in being at the time of the settlement. In considering the matter it is well to remember that although such an annuity does not arise from the will or settlement within the meaning of the Succession Duty Act, 1853, and although it is considered for income tax purposes as being derived from an office yet, as between the estate and the trustee-annuitant, it is a legacy and its validity must be tested accordingly.

Now it may be argued that the general limitations of the settlement must, if they are to be valid, come to an end within the perpetuity period and hence that an annuity to any trustee must commence before the expiry of that period. This, it is submitted, is an over-simplification of the problem. It will be recalled that in *Hull* v. *Christian* and *Clay* v. *Coles*, it was decided that the trustees' remuneration continued, in the one case, "so long as the trustee should have the trouble of executing the trusts of the will" and in the other "so long as the executors should have

duties to perform having regard to the provisions of the will." It is idle to suggest that the trustees' duties and troubles came to an end on the dropping of the last life interest; indeed, it is then that they recommence and the trustees become troubled with the problems of estate duty, realisations, tracing beneficiaries, etc. Furthermore, it may well be necessary to appoint a new trustee after the interests are vested in possession. This would occur where, as sometimes happens, the last life tenant is the sole trustee, or where it is desired to overreach the equitable limitations of a settlement of realty on trust for sale and a second trustee has to be appointed for that purpose.

In the writer's view it is an advantage to consider three different types of settlement which may be designated A, B and C.

A. Where the substantial limitations of the settlement come to an end well within the perpetuity period. Thus, a limitation to X, Y and Z for life, remainder to their children.

B. Where the substantial limitations of the settlement are such that the ultimate vesting in possession is postponed to the limits of the period allowed. Thus, a limitation to X, Y and Z for life, remainder to such of their children as shall be living twenty-one years after the death of the survivor.

C. Where the substantial limitations of the settlement are such that the ultimate vesting in possession may not occur until many years after the maximum perpetuity period. Thus, a limitation to X, a bachelor, for life, remainder to his eldest son for life, remainder to his other children.

In the case A, it is apparent that an appointment of a new trustee could be made at any time up to twenty-one years after the interests have vested in possession and such an appointment would still be made within the perpetuity period. In the normal way the trust would be finally wound up long before the perpetuity period had expired, and indeed if it had not been so the persons entitled could and would take steps to have it wound up long before the expiration of twenty-one years. Hence, any appointment of a trustee made after the death of the survivor of X, Y and Z would be made within twenty-one years thereof and it is suggested, by analogy to *Re Sudeley* [1894] 1 Ch. 334 (which is discussed below), that the provision of the annuity is good and will extend even to a trustee whom it is necessary to appoint after the dropping of the last life interest because ANY trustee appointed MUST be appointed within the period allowed.

In case B, there is no such period to spare and it would seem that the provision is certainly bad so far as it is sought to extend it

to a trustee appointed after the final vesting in possession. Is it, however, good in respect of an appointment of a new trustee made before that time? It is thought that it is not. There is a gift of an annuity, in effect, to any trustee who may be appointed : it is not known who that trustee will be and he is not entitled to his gift until he is appointed : whereas in case A, if the analogy with *Re Sudeley* be accepted, it is known that he must become entitled, if at all, within the perpetuity period, here he may or may not become entitled within that period and hence, it is submitted, the gift is void. And, as is well known, such a gift is not validated if in the events that happen the appointment is made and the beneficiary ascertained within the permissible period. It is possible, not actual, events which matter.

Case C seems to be on all fours with case B so far as the provision of annuities to trustees is concerned.

For the above reasons it is submitted that, except in cases similar to A where the substantive limitations are such that the ultimate interests vest in possession long before the maximum permitted period, so that the estate must be finally wound up within that period, a gift of an annuity to trustees for the time being will be invalid so far as it applies to trustees other than those originally appointed. But, it is submitted, such a provision could very easily be validated by limiting it to those trustees of the will, original or future, who are appointed within twenty-one years of the dropping of the last life in being. If this is done then once again it becomes apparent that anyone who is to take must be ascertained, and his annuity must commence within the permitted period.

Power to Professional Trustees to Charge

A provision of this sort, empowering a professional executor to charge for his services, is, as in the case of an annuity to him, a legacy. Hence, if the executor witnesses the will he will lose his benefit—*Re Barber*, 34 Ch.D. 77. And hence, if the estate is insolvent, he cannot charge profit costs although he can charge out-of-pocket expenses since his right so to do is independent of any provision in the will—*Re White* [1898] 2 Ch. 217. So, if the estate is solvent but insufficient to discharge in full the general legacies then the executor may charge a proportion of his profit costs—*O'Higgins* v. *Walsh* [1918] 1 Ir.R. 126.

Most of the decisions upon this type of provision have been concerned with the question whether the power to charge extends only to work which is strictly professional in character or to work which, although properly carried out by the executor or trustee, could have

been done by a layman without professional assistance. The question is always one of construction and hence there is little to be gained from an examination of all the cases but, in general, there are three types of provision.

It was held in *Harbin* v. *Darby*, 28 Beav. 325, that a power to a solicitor-trustee to charge for professional services does not entitle him to charge for work that a trustee, not a solicitor, could do personally. To meet this decision a clause was designed providing that a solicitor-trustee might " make the usual professional or other proper or reasonable charges . . . whether such business be usually within the business of a solicitor or not," and in *Re Ames*, 25 Ch.D. 72, it was held that this enables the trustee to charge for work which could have been done by a lay trustee without professional aid. That is to say the trustee can charge for all the work which he does for the trust. *Re Ames* was distinguished in *Re Chapple*, 27 Ch.D. 584, when Kay J. expressed the view that the *Re Ames* type of provision should not be inserted by a solicitor-executor into a will drawn by himself " unless the testator has instructed him to insert those very words." A third and midway position was found to exist in *Clarkson* v. *Robinson* [1900] 2 Ch. 722, where, upon a true construction of the clause before the court, it was held that the solicitor-trustee could charge for work done for the estate in the course of his profession whether in the ordinary course or not in the ordinary course thereof, but could not charge for work done outside his profession.

Briefly the three classes may be distinguished in this way. In the first type of provision the solicitor-trustee can only charge for work which a lay trustee would properly have done by his solicitor. In the third type he may charge in addition for work which the lay trustee ought to do himself but might, improperly, have done by his solicitor. In the second type he may charge for all the work which he does about the estate or settlement.

Whilst it is usual to find that the professional trustee is a solicitor yet it need not be so. Thus in *Re Wertheimer*, 106 L.T. 590, one of several executors was a keeper of antiquities in the British Museum. The testator's estate included works of art to the value of upwards of £300,000 and the executor in question rendered valuable services in connection with their realisation. Relying upon a clause enabling professional trustees to charge he proposed that he should be paid a commission of $\frac{1}{2}\%$ upon the sums realised and it was held that he was entitled thereto.

When it has been established for what work remuneration may be charged it remains to be considered at what rate that remuneration

may be charged. In *Re Fish* [1893] 2 Ch. 413, there was a power to charge of the *Re Ames* type and, there being two trustees, the solicitor-trustee rendered his bill, as it were, to himself and his co-trustee and the two settled the accounts. It was held that such a settlement was not binding upon the *cestuis qui trustent* and that they were entitled to have the accounts investigated and to make objections in writing to any items and to make surcharges within a time to be limited. Any contested items ought to be brought before the Judge in Chambers who might refer any of the disputed items to a Taxing Master—*per* Lindley L.J. at p. 421. The principles upon which the charges for solicitors' work proper are to be taxed present no difficulty. The principle upon which the proper charges for non-professional work are to be determined are indicated by Kay L.J. at p. 425, when he examines the meaning of the *Re Ames* type of provision and states its effects as being that the executor could charge for work ". . . which could not properly be solicitors' work as though it was professional work," and at p. 428, when he emphasises that any charges whether or not they are costs properly so called may be moderated by the Chief Clerk or Taxing Master before whom it goes.

Where the professional man concerned is a solicitor the court in exercising this jurisdiction is, of course, assisted by its machinery for taxing costs proper and can proceed to tax the charges for non-professional work by analogy to that scale. Where the trustee is of some other profession it would, if any item were challenged, have to proceed upon general considerations of reasonableness having regard to the normal scales of remuneration prevailing in the profession in question. In *Ellison* v. *Airey*, 1 Ves. 111, there was provision that trustees were to be reimbursed for their expense and it was held that the master must determine what they might reasonably deserve—a decision which was followed in *Willis* v. *Kibble*, 1 Beav. 559.

As in the case of an annuity to trustees there seems to be no direct authority bearing upon the effect of the perpetuities rule upon a power to trustees to charge. Of course, as in that case, the rule can have no effect if the power is restricted to the original executors or trustees and is only relevant where the power extends to trustees for the time being.

The effect of the rule upon powers generally is stated by Parker J. in *Re De Sommery* [1912] 2 Ch. 623, at p. 630—" A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and

twenty-one years afterwards is, by reason of the rule against perpetuities, void." It is observed that it is a matter of construction whether the power is capable of being so exercised and, in considering powers of sale which are on their face unlimited, Gray stated the rule in his book on Perpetuities, 4th ed., para. 493, in the proposition that if it appears to be the intention of the donor that the power shall continue notwithstanding that the legal fee has vested in possession such a power is void. Whichever way it is stated, the result is the same; the true construction of any instrument is only an exposition of what was the intention of the parties thereto.

In *Lantsbury* v. *Collier*, 2 K. and J. 709, at pp. 717–718, Wood V.-C. shows very clearly how a power of sale may be regarded as given for the purposes of the settlement only and how such purposes are exhausted when an absolute interest is acquired; hence a power of sale may be construed as limited to come to an end at that time. Farwell on Powers, 3rd ed., pp. 128–9, in discussing this line of cases, stated: "The true limit is pointed out by the intent of the settlement: when the purposes of the settlement are spent, the power is no longer capable of being exercised; and this is so whatever the nature of the power may be, whether of sale, exchange, partition, enfranchisement, leasing or otherwise." It may be said at once that this can only be true if the words "or otherwise" refer to power *ejusdem generis* as those specified, which are all administrative and do not operate to alter the beneficial interests in the funds as does a power to charge for services.

It appears that there are four possible alternatives when a power to charge is not limited to the original trustees. First: it is good and effective until the trust is wound up completely. It is submitted that this can only be so in the type of settlement referred to above as "case A." In *Re Sudeley* [1894] 1 Ch. 334, property was settled upon certain persons for life and upon their death to be divided among certain other persons with power in the trustees to sell the property at such time as they thought fit. It was held that the power was valid and could be exercised after the deaths of the life tenants since it must be exercised within a reasonable time thereafter, which time must be less than twenty-one years. If, however, the *Re Sudeley* line of cases is examined it will be found that in all of them the period during which the power remained exercisable, even with the addition of an extra reasonable period, was still within the perpetuity period.

Second: that on the *Lantsbury* v. *Collier* principle the power is effective, but only until the final interests limited by the settlement vest in possession. It is submitted that this would be difficult to

support. In the case of a power of sale or, indeed, of any of the other administrative powers set out by Farwell, it is not difficult, upon a true construction of the instrument as a whole, to see an intention on the part of the testator or settlor that such a power should cease upon the vesting of interests in possession, but it is less easy in the case of a power to charge. It would be unreasonable for a testator or settlor to intend that trustees should have the power to sell property when it has vested in possession, and the beneficial owner can decide for himself whether it should be sold or not but, the perpetuity rule apart, is it unreasonable that the testator or settlor should intend that trustees should be remunerated for their work after as well as before the vesting of the ultimate remainders of the settlement in possession? Certainly the writer has never heard a solicitor-trustee who advised the testator upon the drawing of his will express the view that the testator's intention was so limited. Furthermore, even if it were successfully contended that the *Lantsbury* v. *Collier* principle applied it would not validate the power in settlements of Type C. In those cases one would have to spell out an intention that it was to cease on the dropping of the first, not the second, life interest.

Third : that the testator or settlor created not a single power but two distinct powers—one vested in the original trustees and one vested in their successors. If this were so, then the first power would be open to no objection on the ground of remoteness—*Attenborough* v. *Attenborough*, 1 K. and J. 296. In *Re De Sommery* [1912] 2 Ch., at p. 631, Parker J. says: " Although a power vested in the trustees for the time being of a settlement has, so far as I can discover, been uniformly looked upon as a single and indivisible power, it may be otherwise if the power be limited to A and B or other the trustees of the settlement for the time being. In this case the court may treat the settlor as having created one power vested in them and a distinct power vested in their successors." The objection to this alternative is that most powers to charge, if not limited to the original trustees, are in fact given to trustees for the time being.

Fourth : that the power, since it is capable of exercise, and indeed is intended to be exercised beyond the perpetuity period, is void *ab initio*. As Lord Eldon said in *Ware* v. *Polhill*, 11 Ves. 257, if a power is " bad to the extent that it is given you cannot model it to make it good." Doubtless the court would, on many grounds, lean against such a conclusion; yet it is submitted that, unless a power to charge is expressly limited to the period allowed by the perpetuities rule, it might very well be argued that such is the case.

Power to Charge according to Scale

This is the method adopted by trust corporations to secure their remuneration, which usually consists of an " Acceptance Fee " upon a sliding percentage scale upon the gross capital value of the estate; a " Withdrawal Fee " often at ½% of the value of assets distributed and an annual fee charged against income. Certain additional fees may become payable upon the sale or purchase, etc., of any investment.

Where the trust corporation is appointed to be trustee of a settlement the clause incorporated therein will provide for remuneration in accordance with a published scale of fees in force at the date of the settlement, such fees to be payable out of the settled fund. Alternatively the settlor may pay the " Acceptance Fee " direct to the company, and this would seem to be advisable since not only will he avoid paying stamp duty upon that sum but he will also, it would seem, avoid paying an " Acceptance Fee " and a " Withdrawal Fee " upon the amount of the " Acceptance Fee " as would otherwise be the case.

Where the appointment is as executor of a will the precedents of clauses supplied by the various companies require a little more consideration. Originally these provided for remuneration at the scale of fees in force at the date of the will, but the companies found that, although they increased their scales from time to time to meet increased costs, when testators died they were only entitled to the scale in force at the date of the will, which might be many years or even decades earlier.

Accordingly, precedents were devised to provide for the trust corporation to receive the scale of fees in force at the date of the death of the testator : these precedents differ between the various companies but in some, at least, it is difficult to see upon what principles their validity is to be upheld.

One clause before the writer provides that " the company shall be entitled to remuneration in accordance with such scale of fees of the company as may be published and in force at the date of my death." Now it is settled that any remuneration to a trustee is a legacy, and at first sight at any rate this appears to be a legacy which is to be quantified by incorporating into the will a certain unattested document—the published scale of fees.

The law about the incorporation of such documents is well stated by Gorell Barnes J. in *In re bonis Smart* [1902] P. 238. At p. 240 the learned judge says : " It seems to me that it has been duly established that if a testator, in a testamentary paper duly executed, refers to an existing testamentary paper the instrument so referred to becomes part of his will and is incorporated into it : but it is clear

that, in order that the informal document should be incorporated in the validly executed document the latter must refer to the former as a written instrument then existing—that is at the time of execution—in such terms as it may be ascertained." The learned judge does not state whether it must be capable of ascertainment at the date of execution of the will or at the time when it comes before the court, but it will be seen from *Allen* v. *Maddock*, 11 Moo. P. C. 427, at p. 453, that : " It is sufficient that the description should be such as will enable the court, when the evidence is produced, to say what is the instrument intended."

If this is applied to the clause under discussion it will be seen that if, in the event, the company does not change its scale between the date of the will and of the death then the scale is identifiable at the time of the death and was in existence at the time of the will, so that it is validly incorporated. If, on the other hand, the company does change its scale of fees in that period then the scale referred to, although identifiable, was not in existence at the date of the will and so cannot be incorporated.

Hence, so far as its validity is based upon the doctrine of incorporation by reference, the precedent quoted above will not be effective if an alteration in fees is made.

It is possible, however, that the type of provision with which we are concerned may be upheld upon other grounds. A precedent provided by another trust corporation provides for remuneration " in accordance with the terms of remuneration charged by it at the date of my death." This form does not suggest incorporation by reference although, of course, its effect is precisely the same as the clause previously quoted. The principle upon which such may be upheld is that of *Id certum est quod certum reddi potest*—the court can receive evidence to determine what are, in fact, the terms of remuneration customarily charged by the company at the date of death. It is probable that it is on these grounds that the trust corporation would seek to uphold the validity of either of the above-quoted provisions and it may well be that it would be successful. Nevertheless there are some unsatisfactory aspects of the matter.

The position differs from the *Ellison* v. *Airey* line of cases since there the testator did not specify what scale of remuneration his executor was to have so that he must be presumed to have intended a reasonable figure : similarly, it differs from the *Re Ames* type of provision which, it is usually found, specifies " usual professional charges " for professional work and " reasonable charges " for other work. In either case the court can investigate what is reasonable and what is usual, but in the type of provision under discussion the testator authorises not what is reasonable nor

yet what is usual, but what the trust corporation itself lays down, whether it be usual or not and whether it be reasonable or not. Indeed the effect of the provision, if it is upheld, is that the trustee is given a legacy with power to quantify it itself and with no restrictions imposed upon the amount which it may fix except that all estates falling in at any one time must be treated alike.

It would seem that a draftsman who is instructed to incorporate this type of clause into a will should first explain its exact effect to his client and should draw his attention to the possibility of an increase in fees being promulgated before his death. In many cases the trust corporation is well aware of its appointment and keeps a register of such appointments: the client might well prefer to authorise the scale of fees in force at the date of the will knowing that, if the trust corporation later found it necessary to increase them, it would be able to inform him that it would be unable to accept the appointment at the old rate and invite him to authorise the new scale.

A further point to be borne in mind is that if a will authorises the scale of fees in force at the date thereof and if a codicil to that will is subsequently executed then the will is republished at the date of the codicil and would be taken to refer to the scale of fees then in force—which might be different to those originally contemplated.

What of the effect of the perpetuity rule upon the scales of fees charged by the trust corporations? The "Acceptance Fee" seems to be perfectly valid although, of course, if the estate is insufficient to discharge in full the general legacies, *O'Higgins* v. *Walsh* ([1918] 1 Ir.R. 126) will apply to this as to all the fees.

The validity or otherwise of the "Withdrawal Fee" is difficult to determine. On one view it may be said that this is vested in interest, although not in possession, not only on the dropping of the last life interest but at the very commencement of the trusts. From the first day that the trusts come into effect it is possible to say that a one two-hundredth part of the corpus is vested in the trust corporation. The provision that the fee is to be calculated at the date of the withdrawal of the funds may be said to be, in effect, a method of providing for a proportionate distribution. Against this view it must be said that it is a rather artificial way of looking at the matter and that it would seem to involve the proposition that the corporation should get a proportionate share of the income accruing from the date of distribution to the date when the funds are actually paid out. In fact this is not claimed in practice and certainly would not seem to follow upon any ordinary interpretation of the wording of the published scales. Again it may be questioned whether the corporation's interest in

the "Withdrawal Fee" is vested in possession or is contingent upon its carrying out the trusts in a proper manner. The matter may be tested by asking whether the corporation could, at the commencement of the trusts, assign the fee as a vested interest or whether, if the corporation were, for instance, removed from the trusteeship for misconduct, it could still claim its $\frac{1}{2}$ per cent. of the funds when they fell to be distributed. On the whole it seems that the "Withdrawal Fee" is either a legacy which is to be quantified and paid when the funds are withdrawn, which withdrawal may or may not, depending upon the trusts, be outside the perpetuity period and which is in any case contingent upon the due performance of the duties of trustee; or, alternatively, is a power to the corporation to pay a certain fee to itself in certain circumstances which may or may not happen. In either case it seems that its validity is affected by the considerations set out above.

So also the "Annual Maintenance Fees" and the like are peculiar and difficult to uphold. At one time it was not unusual to find a provision that $\frac{3}{4}$ per cent. or 1 per cent. of the income of the fund was to go to the trust corporation until the trust was wound up and that would seem to be good where the beneficiary is a corporation with perpetual succession. It is an interest in (say) 1 per cent. of the income for a definite period : see *Bowman* v. *Secular Society* [1917] A.C. 406 and *Re Chardon* [1928] Ch. 464 at p. 469. The modern form, however, provides for a fixed percentage calculated upon the probate or book value of the assets held in trust when the fee is charged. This is more in the nature of an annuity than of an aliquot share of income and if that were all it might be valid. The matter is complicated by the fact that the payment is not, in fact, a simple annuity, since any annual instalment may well be different from its predecessors. If part of the corpus is distributed the annual fee will decrease : furthermore, if an investment is disposed of at a profit and the proceeds of sale are reinvested the annual fee will thereby be increased. It is difficult not to regard this fee as a power in the corporation which, like the ordinary professional charging clause, may be exercised outside the perpetuity period.

Finally the provision that certain payments shall be made to the trustee upon certain eventualities, such as the sale of an investment, seems to be bad as a gift upon a condition which may not happen within the permissible period (see *Re Lord Stratheden and Campbell* [1894] 3 Ch. 265), and it does not seem that the trustee's perpetual succession can have any bearing in this case.

Conclusion.

It is realised that a number of submissions put forward in this article are controversial and perhaps disturbing. It is surprising indeed that there appears to be no direct authority upon the effect of the rule against perpetuities upon the type of provisions which have been discussed. Such a state of affairs would indicate that the effect is nil and that the provisions are not affected by the rule. Yet it is thought that the arguments put forward, although they might not prevail with the court, are yet weighty enough to demand an answer, and some advance will have been made in knowledge if this article should stimulate anyone to produce an answer which will indicate the grounds upon which these types of provisions can be upheld.

DISPUTES OVER THE MATRIMONIAL HOME

By Edward F. George, ll.b., Solicitor

The matrimonial home is frequently the main or only substantial asset of a husband and wife and, if the marriage should break down, a bitter dispute over the beneficial ownership and right to occupation of the home often follows in its train. Such a dispute presents especial difficulty, for the home was probably acquired when the parties were living in harmony and not greatly concerned with their legal rights. It may be necessary to trace the financial history of the parties from the time they were married, to try to find where the money used to buy the house came from and why the conveyance was taken in the particular form it was. A house may have been bought in the name of the wife simply because the husband was on active service; it may have been bought in the name of the husband alone although the parties are refugees married in community of property. Where the funds of both parties have gone into the home, it may make a great deal of difference whether a particular spouse is entitled to a share in the home or merely to a charge on it for the money put up. Even when these difficulties are resolved, the right to occupation presents a separate problem.

Title to Home

(i) *Conveyance in Husband's Name.* The first question that arises is, whose is the home? Prima facie the person in whom the legal estate is vested is also the beneficial owner, but this is subject to a contrary arrangement specifically arrived at between the parties and to the presumption of a resulting trust implied in equity where property is bought by one person and the conveyance taken in the name of another. The conveyance may be to one spouse alone or to both of them jointly and each case must be considered separately. If the conveyance is taken in the name of the husband and the wife provides the purchase money, the position is simple. The presumption of a resulting trust operates and, unless it can be rebutted, the wife is the beneficial owner (*Dyer* v. *Dyer* (1788) 2 Cox Eq. 92). This can be rebutted by statements and conduct made before or at the time of the purchase, but subsequent declarations, acts and conduct are only admissible against the party making the declarations or doing the acts

(*Scawin* v. *Scawin* (1841) 1 Y. & C.C.C. 65; *Warren* v. *Gurney* [1944] 2 All E.R. 472). If the presumption is rebutted, there is no presumption of undue influence to prevent the transaction taking effect as a gift (*Howes* v. *Bishop* [1909] 2 K.B. 390), though, of course, this might be shown affirmatively. Where the parties are not married at the time of the purchase, there is a presumption of undue influence (*Re Lloyds Bank, Ltd.* [1931] 1 Ch. 289).

(ii) *Conveyance in Wife's Name.* In the converse case, where the conveyance is taken in the name of the wife and the husband provides the money, the position is different. Here the presumption of a resulting trust gives way to the countervailing presumption of advancement, so that, unless the latter presumption can be rebutted, the wife is beneficially entitled to the property (*Mercier* v. *Mercier* [1903] 2 Ch. 98). The presumption of advancement obtains not merely where the parties are married at the time of purchase, but also when they are then engaged to be married (*Moate* v. *Moate* [1948] 2 All E.R. 486). Again, the declarations and acts of one party after purchase are only admissible against that party. So the mere fact that the husband pays the instalments of a building society mortgage would not rebut the presumption of gift; on the contrary *prima facie* those instalments also are by way of advancement (*ibid.*). The position in this case should be contrasted with that where the wife puts up the deposit but the conveyance is taken in the name of the husband who subsequently discharges the mortgage. Here there is no basis on which the presumption of advancement can operate and the husband is either a beneficial tenant in common or entitled to a lien for the money put up (see *Re Rogers' Question* noted below).

(iii) *Conveyance in Joint Names.* If the wife provides the purchase money and the conveyance is taken in the joint names of the spouses, again there is a resulting trust in her favour (*Dyer* v. *Dyer, supra; Wray* v. *Steele* (1814) 2 V. & B. 388). If the husband provides the money, prima facie there is a gift of a beneficial half share in the joint tenancy. Quite often the husband will state that, though he provided the whole of the purchase price, the conveyance was taken in joint names "for convenience." When pressed to explain what he and his wife meant by "convenience," it is usually found that their ideas were extremely vague and turns out that neither party had any intention of making a present gift to the other. It is easy to follow that a bank account consisting entirely of the husband's money may be opened in joint names for convenience, the presumption of advancement being

thereby rebutted (*Marshal* v. *Cruttwell* (1875) L.R. 20 Eq. 328), and, although it is difficult to follow the reasoning of persons who have land put in joint names for convenience, if that was the arrangement, it would seem that the presumption of advancement should be equally rebutted in that case.

Purchase Money Provided Jointly. Where the property is purchased out of funds belonging to both parties, then, if the purchase money is put up in unequal shares and the conveyance is taken in joint names, there is a presumption that the parties are tenants in common in equity in proportion to the shares put up (*Lake* v. *Gibson* (1729) 1 Eq.Cas.Ab. 290). And apparently the position in equity would be the same even if the conveyance were taken in the name of one of the parties only (*Wray* v. *Steele*, *supra*).

The Decisive Time. So far no distinction has been drawn between the position at the time of contract and that at the time of conveyance, but it is in all cases essential to go back to the contract. If one of the parties enters into a contract in his own name and provides the deposit then paid, the mere fact that the other provides the balance of the purchase price will not give her the right to a beneficial interest in the property; at most she will have a lien for the amount she provides. If the conveyance is taken in the name of the same person who signed the contract, there is no room for any presumption either of a resulting trust or of advancement. If, however, the conveyance is taken in a different name, clearly an explanation is called for. It might, for example, be shown that the spouse signing the contract was acting as the agent for the other spouse. But, if no explanation is forthcoming, the presumption of a resulting trust or of advancement, as the case may be, will operate. So where a spinster entered into a contract to purchase and after marriage the conveyance was taken in the name of the husband who provided the balance of the purchase price, it was held that the wife was the sole beneficial owner, subject to the husband's lien for the amount he had advanced (*Maddison* v. *Chapman* (1861) 1 John. & H. 470).

The function of the court is "after seeing and hearing the witnesses, to try to conclude what at the time [the transaction in question was entered into] was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself" (*Re Rogers' Question* [1948] 1 All E.R. 328). In that case the husband signed a contract to buy a house for £1,000, the wife providing the deposit of £100. The conveyance was taken in the name

of the husband, the balance of the price being lent to the husband on the security of a building society mortgage. Each claimed to be sole beneficial owner of the house, treating the other's contribution as a loan or charge. The court held that the proper inference was that they were intended to be tenants in common in the ratio 1 : 9.

In a case decided by a King's Bench Master some years ago, a husband and wife had had a series of houses all purchased in their joint names, the purchase money being originally provided by the husband. The husband then entered into a contract in his own name to purchase yet another house and paid the small deposit out of his own pocket. The balance of the purchase money was provided partly out of money raised on mortgage and partly out of the proceeds of sale of the previous house which had in the meantime been sold. Subsequently a quarrel arose and the wife claimed to be entitled as joint tenant to one half of the property. There was no evidence of an agreement prior to contract that the parties should be joint tenants and no inference could be drawn from the mere fact that previous houses had been in joint names. Accordingly it was held that the husband was the sole beneficial owner, the wife merely being entitled to a charge in respect of the money originally contributed by her, including her one half share of the sale price of the previous house.

Whose are the Funds. Usually it is not until one comes to apply the principles that the difficulties arise and the first difficulty is to ascertain to whom the money belonged. This often involves tracing the source of the money. Where the parties kept their funds separate it is relatively easy to ascertain how much each put up, but where they were intermingled they have to be disentangled. The simplest case is where the wife brought little or no money into the marriage and has not earned since. In such a case if a bank account were to exist it would have been fed entirely from the husband's money and, subject to contrary agreement, the money would remain the husband's even if the bank account were in joint names or the wife's sole name (*Blackwell* v. *Blackwell* [1943] 2 All E.R. 579; *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406). Further, if the wife invested the savings from the housekeeping money the investments would belong to the husband (*ibid.*).

In some classes of the community it is not uncommon for the wife to have substantially the whole of the husband's income, she seeing to all household expenses and the husband retaining merely pocket money. Here, the onus of showing that it was agreed that the savings should belong to the wife would be very heavy

indeed, for it would mean that the husband gave up all right to the matrimonial assets. The onus of showing even that it was agreed that the savings should belong to the spouses jointly would be heavy simply for the reason that it would evince a rather commercial outlook on an essentially uncommercial relationship. The mere fact that the wife brought a small amount of capital in or subsequently acquired, *e.g.*, by inheritance, a sum which was put into the bank account would not be sufficient to show an intention that the matrimonial funds should belong to the parties jointly; rather the wife would expect to be entitled to take back what she actually provided in the event of division.

Where the husband's position is rather more substantial than in the class of case just discussed the inference to be drawn from similar facts may well be different. Normally in the middle classes the husband retains control of his income giving an allowance for housekeeping to his wife. In such a case probably very little evidence would be required to show that the savings from housekeeping were a gift to the wife, particularly where the wife had a separate account. For example, if for a period of years the wife treated the savings as her own no doubt the court would infer a gift, but the mere fact that she had invested the savings in her own name would not itself be enough.

Where both the husband and wife earn income after marriage, keeping one joint account, then even though the contribution of the one is substantially less than that of the other, the balance in the account prima facie belongs to the parties jointly. It is hardly surprising that in such a case the court held that " it was inconsistent with the idea of a joint account, and a common pool of resources, that the parties should afterwards, in the event of a divorce, pick the account apart and divide it up proportionately to their respective contributions. The true view was that the money paid into the account became joint property . . ." (*Jones* v. *Maynard* [1951] W.N. 203, *per* Vaisey J.). Once the position of a common pool has been established it would need a fresh agreement to alter it.

Equitable Lien for Money Spent

Once it is found that one of the spouses is beneficial owner and that the other has put up money which has been spent on the house, it is necessary to inquire into the rights of the latter. A distinction must be drawn between advances before contract and those after. In the former case there can be no question of a lien for there is no property on which it could be charged so that the advance must be a loan or gift, for *ex hypothesi* the

payer is not a tenant in common. If the advance is made after contract it may be a gift, loan or charge on the property.

Where, after the contract of purchase is entered into, a husband expends his wife's money on the property, either with or without her consent, she is entitled to an equitable lien on the property for the amount so expended (*Scales* v. *Baker* (1859) 28 Beav. 91; *Outram* v. *Hyde* (1875) 24 W.R. 268). The position is the same where the parties are reversed. The rule is not quite the same where one spouse spends his or her own money on the property and a distinction has to be drawn between payments in reduction of incumbrances and those for repairs and improvements. Where the payment is made in reduction of an incumbrance, including, of course, the balance of the purchase price, then the payer has a lien if the property was either in his name or if the payment was made with the consent of the other spouse which will readily be implied in the absence of dissent (*Outram* v. *Hyde*, *supra*; *Pitt* v. *Pitt* (1823) T. & R. 1803). Where the property was a gift by the husband to the wife the subsequent expenditure may, as we have seen, equally be a gift. But, in general, expenditure on improvements, and still less that on repairs, does not give rise to a lien. There is an exception in the case of improvements where either the spouse incurring the expense is the legal owner and thought the property belonged to him in equity (*Neeson* v. *Clarkson* (1845) 4 Hare 97) or, presumably, where the other spouse consented to the expenditure.

The party claiming the lien bears the onus of showing that his or her money was spent and the extent of the expenditure. In *Re Sims* (1946) 175 L.T. 113, a wife spent her army allowance in reduction of the building society mortgage on the home which belonged to her husband. It was held that the allowance was on the same footing as money paid by the husband for housekeeping or maintenance and that she had accordingly failed to discharge the burden. Again, in a Scotch case where a wife had both funds of her own and funds coming from her husband it was presumed that she expended the latter rather than the former in keeping down the mortgage payments (*Preston* v. *Preston*, 1950 S.C. 253).

The circumstances may show that one party merely lent funds to the other. It would seem that in general loan excludes lien and vice versa. If the wife expends her money on the husband's property her remedy is to enforce the lien, if she has one, and not to sue the husband for the return of the money. Conversely, if she lends him money, she may sue at any time for its return and need not await the sale of the property. There are, however, cases

where she has both a lien and a personal right of reimbursement, as where the husband uses her money without her consent.

It will be appreciated that the question whether one party has a lien cannot be answered until the question of beneficial ownership is determined. In *Re Rogers' Question*, *supra*, there were three alternative findings open to the court: first, that the deposit put up by the wife was a personal loan to the husband, he being the sole beneficial owner, in which event there would have been no lien; secondly, that she was the sole beneficial owner, in which case he would have had a lien for the money he subsequently put up; and thirdly, that they were tenants in common. The court having found in favour of the third alternative, the question of lien fell away.

Marriage in Community

There is one case that seems to be rather overlooked in practice and that is where the parties were domiciled abroad at the date of their marriage and, by the law of their domicile, they were married in community of property. Where a solicitor is acting for a refugee he should ascertain the husband's domicile at the date of marriage and, if by that law the marriage is in community of property, the community continues during the subsistence of the marriage notwithstanding a change of domicile (*de Nicols* v. *Curlier* [1900] A.C. 21). All funds are community funds and accordingly all assets purchased, including English land, belong to the parties in equal shares (*Re de Nicols* [1900] 2 Ch. 410). Moreover there does not appear to be any way in which the joint tenancy can be severed except by dissolution of the marriage or death.

In some legal systems, for example, those of Congress Poland and the Western Provinces of Poland until 1946, although marriages are not in community of property unless the parties so agree, the husband is given a life usufruct in the property of the wife brought into the marriage. There seems no reason why the English courts should not give effect to this life interest. The consequence would be that where a house in England is bought with both the husband's and the wife's money, the house would be held on trust for sale and, as to the wife's share, the trusts would be for the husband for life and, subject thereto, for the wife absolutely.

Right to Occupation

Having ascertained the proprietary rights of the parties it by no means follows that the disputes over the matrimonial home are resolved. On the contrary, the right to occupation

gives rise to difficulty. If the matrimonial home belongs to one spouse and the other occupies it either exclusively or jointly the latter is a licensee (*Brown* v. *Draper* [1944] K.B. 309; *Old Gate Estates* v. *Alexander* [1950] 1 K.B. 311); but he or she is a licensee with a difference for, although apparently the owner can determine the licence by reasonable notice in the usual way, it does not follow that he or she can exclude the licensee from occupation. It has been doubted whether, in the case of a statutory tenancy under the Rent Restrictions Acts, the husband-tenant who has deserted his wife can terminate the wife's licence to remain in occupation (*Old Gate Estates* v. *Alexander*, *supra*, at p. 318, *per* Bucknill J.; *Middleton* v. *Baldock* [1950] 1 K.B. 657; but see *Taylor* v. *McHale*, *Estates Gazette*, May 15, 1948, p. 371). Before one spouse can turn the other out of the matrimonial home he must obtain an order of the court and, if an attempt to exclude her by force were made, it would seem that she might well successfully apply for an injunction.

A husband can never sue his wife in tort, nor can a wife sue her husband except for the protection and security of her property (Married Women's Property Act, 1882, s. 12, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935). Accordingly he cannot sue his wife as a trespasser. There is some doubt whether a husband can sue in ejectment: it has been said that he can in appropriate cases (*Doe* d. *Merigan* v. *Daly* (1846) 8 Q.B. 934; but see *Bramwell* v. *Bramwell* [1942] 1 K.B. 370, and *Pargeter* v. *Pargeter* [1946] 1 All E.R. 570). But, technically, where the wife was a licensee, she never having been in possession, ejectment would not appear to be an appropriate remedy. Ejectment would lie where the relationship between the parties was lessor and lessee and, in this connection, it may be noted that, where the justices have made a maintenance order against the husband providing for a lower sum to be paid so long as the wife lives in the house belonging to the husband, she does not become a tenant (*Bramwell* v. *Bramwell*, *supra*).

It is only in rare cases that a wife can sue the husband in tort. The mere fact that the matrimonial home belongs to her does not give her a right to claim an injunction excluding the husband, but if the value of her property is affected by her husband's conduct, as where she is conducting her home as a boarding house and his conduct is destroying her business, an injunction will be granted (*Shipman* v. *Shipman* [1924] 2 Ch. 140). Further, the court has jurisdiction to grant an injunction in a proper case where the husband's conduct makes it intolerable for the wife to live there

with him or where the refusal of an injunction might result in improper pressure being brought to bear on the wife to persuade her to drop matrimonial proceedings against her husband (*Boyt* v. *Boyt* [1948] 2 All E.R. 436; *Teakle* v. *Teakle* (1950) 66 T.L.R. (Pt. 2) 588).

Although the husband can never sue his wife in tort and the wife her husband only rarely, both have available the remedy conferred by section 17 of the Married Women's Property Act, 1882. This section provides that, in any question between husband and wife "as to the title to or possession of property", either party may apply in a summary way to the High Court or a county court for the determination of such question. The party may apply to any Division of the High Court. Where there are already matrimonial proceedings pending the application is usually made to the Divorce Court, where the hearing is by a registrar. In other cases it depends entirely on the solicitor's personal preference. In the King's Bench Division the hearing is by a master, but in the Chancery Division the hearing may be adjourned to the judge in the usual way. Once a marriage has been dissolved there is no jurisdiction to hear an application under the section, but proceedings already pending before decree absolute may be continued (*Hichens* v. *Hichens* [1945] P. 23).

The section enables the court not merely to ascertain the proprietary rights of the spouses but also to make ancillary orders and orders have frequently been made awarding possession to one party. The mere fact that one party owns the matrimonial home is not sufficient in itself to entitle him or her to an order excluding the other, for that would have the effect of a separation order. The court has the widest possible discretion and it is very difficult to lay down any general principles. The reason for this is probably that the question of the occupation of the matrimonial home is usually only one facet of the problem caused by the breakdown of the marriage and cannot be separated from matters such as maintenance. Where matrimonial proceedings are pending the court will endeavour to preserve the *status quo* pending their result (see, *e.g.*, *Richman* v. *Richman* (1950) 66 T.L.R. (Pt. 2) 44). A very strong case would have to be made out before the court would exclude an innocent party from the matrimonial home.

If matrimonial proceedings end in divorce or nullity the problem ceases to exist for the parties are not thereafter husband and wife. In the case of judicial separation, the Divorce Court having power to order the husband to pay permanent alimony and to order a settlement of the wife's property, normally the owner of the home would not be kept out of his property indefinitely. On the

other hand, the court will not treat the occupier as on the same footing as an ordinary trespasser to be turned out without reasonable time to find alternative accommodation. Further, the husband's primary obligation to provide a wife who has not been guilty of a matrimonial offence with proper accommodation must not be overlooked and in an appropriate case the court will refuse to make an order for possession (*Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792—it does not appear from the report that any order for alimony had been made or that the husband was making any provision for the wife). There does not appear to be anything to prevent the husband making a subsequent application on change of circumstances.

Where there are no matrimonial proceedings, the court will have regard to the conduct of the parties, the husband's obligation to provide a matrimonial home and the reason for the application. Prima facie an innocent party, especially the wife, will not be excluded from the matrimonial home (*Richman* v. *Richman*, *supra*) but there is no rule, even when matrimonial proceedings are pending, that the court must not make an order excluding the wife unless the husband provides alternative accommodation (*Stewart* v. *Stewart* [1948] 1 K.B. 507). If the owner bona fide requires the property for sale an order for possession will usually be made. The position is similar where it would be intolerable to compel the owner to continue to live in the same house as the other spouse.

Where an order has been made under the section postponing possession until the husband provides the wife with an alternative house, it has been held that the court has no power to vary the order subsequently, even under an express provision in the order giving liberty to apply, at any rate unless there is a change in circumstances. In such a case the wife's licence is irrevocable (*Cristel* v. *Cristel* [1951] 2 K.B. 725).

Quite apart from section 17 of the Married Women's Property Act, 1882, the court has inherent jurisdiction to make whatever order is necessary to protect a spouse, particularly when matrimonial proceedings are pending, but where the home belongs to both spouses it does not have jurisdiction to exclude one from the home where that one has not been guilty of any wrongdoing (*Richman* v. *Richman*, *supra*). There do not appear to be any cases arising out of the enforcement of the statutory trust for sale in the case of a matrimonial home belonging to the spouses as beneficial joint tenants or tenants in common, but it seems likely that the court would exercise its discretion whether or not to order a sale, and, if so, when, on similar lines to its discretion to make an order for possession under section 17.

Rights Against Third Parties

Where the property belongs to both spouses but is in the name of one only, the enforceability of the other's rights against third parties depends on the ordinary principles of notice; so also where one party is entitled to a lien. The position of a spouse-licensee is, however, somewhat illogical. It does not appear that the court can prevent the owner from selling the property and the licensee's rights do not prevail against a purchaser even with notice (*Thompson* v. *Earthy* [1951] 2 K.B. 596). The only way in which he or she can obtain full protection against third parties is by an order of the Divorce Court raising him or her to the status of a tenant for life, under an order creating or varying a settlement (*Bacon* v. *Bacon* [1947] P. 151).

There is, however, one case where the spouse-licensee's rights do prevail against a third party and that is under the Rent Restrictions Acts. Here, if the husband is a statutory tenant and the wife is in occupation as his licensee, he is in possession through her and a landlord seeking to obtain an order for possession would have to sue both (*Brown* v. *Draper* [1944] K.B. 309). As between the wife and the landlord, the husband's consent to an order for possession or his purported termination of her licence is of no avail. The court may, of course, in a proper case make an order for possession in favour of the landlord. And divorce brings to an end the wife's privileged position: she then becomes a trespasser and the landlord is entitled to possession (*Robson* v. *Headland* (1948) 64 T.L.R. 596).

THE CLASSIFICATION OF INTERESTS IN REGISTERED LAND

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The important controversy conducted by the late Professor Harold Potter and Mr. A. D. Hargreaves in 1949 (12 Mod.L.R. 139, 205, 477) raised a number of points of detail, besides the wider general issues of the correct approach to the impact of the system of land registration on traditional land law. The answers to these points have been left in suspense in several instances. After studying the arguments advanced in 1949 and re-examining the Act and Rules, it is hoped to submit a tentative solution to some of these problems.

(1) The Agreement for a Lease, *i.e.*, an informal agreement for a period long enough to require a deed in order to create a legal estate. Here it is submitted that agreements for such leases must be protected by registration under L. R. R. 186 (operating under L. R. A., 1925, sections 48, 59 (2) or 49 (1) (c)). Otherwise they will be overridden by a later lease or sale, thanks to L. R. A., sections 20 and 23. Such an agreement for a lease is not an overriding interest, but a minor interest.

That an agreement for a lease is not an overriding interest appears from the general construction of the statute, and from the provision in L. R. A., section 107 (1). Section 107 refers to the power of a registered proprietor to enter into a contract "with reference to" registered land, such contract to be enforceable as a minor interest. Subsection 2 refers to contracts entered into "for the benefit of any registered land." At first sight it would seem that section 107 is concerned with contracts which run with land under the rules in *Spencer's Case* and *Tulk* v. *Moxhay*. The two subsections contemplate a contract binding the registered land (subsection 1) and one which benefits that land (subsection 2), and they would operate as an incorporation into the land registration system of sections 78 and 79 of the L. P. A., 1925, which refer to contracts "relating to any land" (and "relate" is the same verb as "refer"), and sections 141 and 142 of the L. P. A., which, in relation to covenants between lessor and lessee, speak of them as "having reference to" the lease. Hence section 107 would not

seem to be concerned with equitable leases but with covenants in the nature of incumbrances on property. Still, the section is so wide that a *Walsh* v. *Lonsdale* agreement for a lease might still fall within it. The learned editor of Brickdale (p. 191 (iii)) states that an equitable lessee is still protected, as he was protected before 1926, but gives no authority for this. The registration of estate contracts under the L. C. A., 1925, in unregistered conveyancing, is a new thing and changes the whole picture. Hence an agreement for a lease, operating to create a term of years in equity, must be registered under L. R. R. 186, just as a restrictive covenant must be registered under L. R. A., section 50, as a charge on the superior title.

An agreement for a lease obviously cannot be registered as a title in itself as L. R. A., section 8, which deals with leasehold titles, refers to "estate owners" and these are defined by section 3 (iv) as persons who own legal, not equitable, estates.

The agreement for a lease satisfies both parts of the definition of a minor interest. This is the most complicated definition in the Land Registration Act (s. 3 (xv)) and puts minor interests into several classes. If an interest is not capable of being created by a registered disposition, and can be overridden unless protected under the Act, it is a "minor interest." Now a registered proprietor has power to create leases (L. R. A., section 18 (1) (e)), and section 3 (x) states that "lease" includes an "agreement for a lease." But this extension of the definition of a "lease" is excluded by section 18 (4), which provides that "no estate, other than a legal estate, shall be capable of being disposed of, or created under this section". A *Walsh* v. *Lonsdale* agreement for a lease is an equitable estate. Any agreement for a period of more than three years is outside the powers conferred by Part III of the Act (which includes section 18). An unregistered agreement for a lease also satisfies the alternative definition of "minor interest" as an interest which is not protected under the Act and is not overriding.

It may be suggested that a tenant in occupation under such a lease would be protected as having an overriding interest under L. R. A., section 70 (1) (g), as a person "in actual occupation of land." This argument has the advantage that section 70 refers to the entire Act, and not merely part of it. In unregistered conveyancing the similar protection conferred by L. P. A., section 14, is limited to Part I of the L. P. A. (sections 1–39), and hence is overridden by the provisions of L. P. A., section 199 (1) (i), that an unregistered estate contract (which includes an agreement for a lease) is void against a later lessee or purchaser unless registered under L. C. A., 1925. The tenant might also be protected by

referring to L. R. A., section 70 (1) (k), which protects leases at a rent for not more than 21 years, and incorporating the " agreement for a lease " in the word " lease " under L. R. A., section 3 (x). These suggestions seem inconsistent with the general policy of the Act. Section 70 (1) (g) would protect a purchaser of registered land who failed to have his name entered on the proprietorship register, if such a wide interpretation is accepted, and this would entirely defeat the Act. It is submitted that Rule 186, which provides for the entry of notices of agreements for leases, thanks to the wide provision in L. R. A., section 144 (2), giving the rules statutory force, supersedes any such effects of section 70. Whether Rule 186 operates under section 107 is open to question, but appears to be immaterial.

(2) LEASES WITH AN ABSOLUTE PROVISO AGAINST ASSIGNMENT. This type of lease is becoming commoner. It eliminates the danger of a contractual tenancy becoming a statutory tenancy under the Rent Restriction Acts in the hands of an assignee, and obviates the embarrassment of giving notice to the original tenant, who will certainly ignore the notice and rely on the protection of the Acts.

The unassignable lease is not registrable as an independent leasehold title (L. R. A., section 8 (2)), nor can its creation be completed by such registration, in spite of L. R. A., section 19 (2). On the other hand the unassignable lease appears to persist as a legal interest, satisfying the definitions of such interests in L. P. A., sections 1, 205 (1) (xxvii). It may therefore be created under L. R. A., section 18 (1) (e), under the powers of a registered proprietor. Such disposition is completed by the entry of a notice of the existence of the lease as an incumbrance in the charges register of the lessor's title (section 19 (2); section 48, L. R. R. 186). If such a lease was created before the title was registered, the lessee may be protected as having an overriding interest, if in actual occupation, though this is doubtful. If it is created after 1925 it seems even more dubious, as section 19 (2) states imperatively that notice must be noted on the register to complete the exercise of any power of the registered proprietor. If not protected by notice, the lease will be overridden under L. R. A., sections 20 and 23 (*cf.* Brickdale, p. 89 (b)). There must be no confusion between registering such a lease as a title, which is prohibited, as no dealings with it are possible, and entering a notice of its existence against the superior title, which is essential.

The whole object of L. R. A., section 8 (2), seems to be unpractical. It assumes that there will in fact never be any

disposition of an unassignable lease. It is always possible for a lessor to allow a particular assignment of such a lease by the procedure laid down in L. P. A., section 143, *i.e.*, the lessor licenses a breach of the covenant against assignment, where a suitable assignee is forthcoming, and without prejudice to his right to prevent further assignments. Hence section 8 (2) appears to be unrealistic.

How is this interest to be classified? If it is right to assume that it is not an overriding interest it satisfies the second definition of a "minor interest" in section 3 (xv). If notice of its existence is entered on the charges register of a superior title, it ceases to satisfy this definition. It then falls within a fourth class of interest, *viz.*, interests protected by entries on the register, being neither minor nor overriding nor "registrable," in Professor Potter's sense of an interest registrable as an independent title. The editor of Brickdale suggests that an overriding interest can remain overriding though in fact protected on the register, *e.g.*, an easement created by deed (p. 74 (i)) but this would contradict the definition of overriding interests in section 3 (xvi). The same objection exists to treating an interest as a minor interest after it is protected on the register.

(3) Personal Representatives. An interesting situation arises where personal representatives take advantage of L. R. A., section 37, and L. R. R. 170, and deal with the land of the deceased without themselves applying for registration as proprietors. It is clear that the registered estate will pass to their assigns, when themselves registered (sections 37 (2), 19 (1)). Does any, and if so, what, estate vest in the personal representatives? This is so fundamental a point that it deserves a brief note, though it does not so far appear to entail practical difficulties.

Where property is conveyed *inter vivos* the vendor remains owner of the registered estate in the land until the purchaser has his name placed on the register (L. R. A., sections 19 (1), 22 (1)). This cannot apply to a devolution on death. L. R. A., section 61 (5), specifically vests the registered estate of a bankrupt in his trustee in bankruptcy. There appears to be no corresponding provision for personal representatives. Little help can be derived from the Act which speaks with two voices on the subject. L. R. A., section 73 (3), obliquely suggests that the registered estate vests automatically in the personal representatives. Section 41 and Rule 168 suggest the contrary. Section 37 offers no clear opinion.

It seems that the personal representatives acquire a legal interest in the property, but not the registered estate. That an unregistered

legal estate can exist under the system of land registration is confirmed by sections 3 (iv), 4 (a) and 123 (3). Legal mortgage terms are recognised as valid and subsisting, though postponed for failure to register (section 27 (3)). Since the interest of the personal representatives is capable of being registered, if they apply for such registration, it is not made equitable by L. R. A., section 2 (1). Section 19 (1), which prevents a purchaser acquiring the registered estate, also prevents his acquiring the legal estate, since section 69 vests these in the registered proprietor until his name is cancelled on the proprietorship register. But where there is no registered proprietor this does not apply.

How should the interest of the personal representatives technically be classified? It is arguable that it is a minor interest, assuming it is not overriding, as it is not registered or protected on the register. Its protection springs from the practical point that only the personal representatives are in a position to make any effective disposition, not from any specific statutory protection. It is equally arguable that it is an overriding interest within section 3 (xvi), since the enumeration of overriding interests in section 70 is not stated to be exhaustive but simply illustrative. The definition of overriding interests includes powers, not themselves entered in the register, subject to which registered dispositions are to take effect. This would include a mortgagee's power of sale under section 71 and might be wide enough to include the " off-the-record " powers of disposition under section 37 of a personal representative who has decided not to apply for registration as proprietor.

(4) LEGAL EASEMENTS. The topic of legal easements, apparently one of the simplest sections of land registration, is, in fact, one of the most complicated. It is complicated by two different methods of sub-division. There is the sub-division between the benefit and burden of the easement, and there is the sub-division of creation of easements into express grant, implied grant and prescription. Failure to register may have no consequences, or it may affect the enforceability of the right, or it may even affect its inherent validity. Logically, implied grant should be equated with express grant, but it is submitted that in fact the real difference under the land registration system is between documentary and non-documentary creation of easements. Prescriptive easements have no documentary basis, and the same is generally true of implied easements, since they are not referred to in the conveyance, though they derive their legal force from it.

(A) PRESCRIPTIVE AND IMPLIED EASEMENTS. It is generally agreed that these do not require any form of entry on the register.

Reasons of convenience dictate this. It is supported by the fact that L. R. A., section 70 (1) (a), treats legal easements as overriding interests, and no other section appears to graft any exceptions on this in the case of prescriptive or even implied easements. The burden of all such easements would therefore attach, even if the existence of the easement is not noted against the servient title as a charge (section 70 (1) (a), and section 75 (5)). This is also Brickdale's view (p. 420). The benefit of such rights also attaches to, and passes with, the dominant land, without any form of registration. Section 72 makes this provision where the right was acquired before first registration of title. Section 19 (3) incorporates implied grant by " general words " as in L. P. A., 1925, section 62. There is no express provision as to implied grant under the rule in *Wheeldon* v. *Burrows*, but neither is there any provision in the L. P. A., 1925, on this point, and that rule is still in force, so that it appears to operate in the case of a registered disposition also, as being necessary to make the grant effective. Section 20 (1) appears to give a transferee of registered land all existing appurtenant rights, including those created since first registration. This section would include " general words " under L. P. A., section 62, and existing perfect easements, but would not in so many words apply the rule in *Wheeldon* v. *Burrows*.

Such easements may all be registered, if the dominant owner wishes. The benefit of the easement may be registered on the property register of the dominant land under section 19 (2) (c) and L. R. R. 252. The burden may be registered on the charges register of the servient land under section 70 (3) and L. R. R. 197.

(B) Easements Created by Express Grant. When the L. C. A., 1925, provided for the registration of various incumbrances it exempted such incumbrances in existence before January 1, 1926. Convenience was one reason, the idea of vested interests another. L. R. A., 1925, does not lay down any such clear principle, but the practical effect seems to be much the same.

(i) *Easements subsisting before first registration of title.* The benefit of such easements is saved by section 72 (*cf.* L. R. R. 251). Brickdale says they run with the land without registration (p. 328 (d)). The burden still runs with the servient land, owing to section 70 (1) (a). It is true that section 70 (2) provides that the registrar shall enter notices of express easements existing at the time of first registration, but L. R. R. 41, which implements this subsection, leaves the registrar a discretion, so that such registration cannot be an imperative condition of protection of the easement. Section 144 (xvii) specifically provides for registration of the burden

of easements on first registration, but section 144 (2) goes on to give the Rules the force of law, and Rule 41 does not in fact go so far as to require registration.

(ii) *Easements expressly granted or reserved since first registration of title.* The general provision in section 70 (1) (a) that legal easements shall be overriding is here in conflict with other provisions. L. R. A., section 18 (2), authorises the registered proprietor to grant an express legal easement. Section 19 (2) (c) suggests that registration of notice of the burden of such an easement against the charges register of the servient property is imperative, as well as registration of the benefit on the property register of the dominant land. Brickdale (p. 104 (h) (i)), says that the provisions as to the benefit must be applied, but that the provisions about the burden can be ignored. This seems inconsistent. Section 144 (xviii) speaks of the grantee as having a right to insist on the burden being noted against the servient land. It is not clear whether the imperative duty is an administrative duty of the registrar or the private duty of the grantee, but it appears to be the latter. This is convincingly argued by Mr. Hargreaves and Mr. Megarry in various places and appears to be generally accepted. How can it be reconciled with section 70 (1) (a) which treats legal easements as requiring no protection? This seems soluble in several ways. Section 70 merely deems registered land to be burdened with legal easements, if any. It does not say that all legal easements will so burden it. An interesting speculation might also be made on the wording of L. R. A., section 19 (2), and section 70 (1) (a). The latter section does not protect "equitable easements required to be protected by notice on the register." Assume that Mr. Smith owns the Blackacre estate, the title to which is registered. He sells North Blackacre to Mr. Brown, and grants him an easement of way over South Blackacre, which Mr. Smith retains. Section 19 (1) says that Smith remains registered proprietor of North Blackacre until Brown is registered, and legal owner thereof under section 69, on trust for Brown (*cf.* Brickdale 102 (a)). Section 19 (2), which applies to the grant of the easement, says that it shall be completed "with the same effect as" the transfer of North Blackacre. Mr. Smith might therefore be a trustee of the equitable easement for Mr. Brown, though this is an odd position for the owner of servient land, as he holds his land subject to an obligation to convey the easement in legal form. On entry of the appropriate notice the easement would become legal under section 19 (2).

(C) CLASSIFYING EASEMENTS. If, in fact, the registrar notes on the register an easement, under L. R. A., section 70, or a new

express easement is protected under section 19 (*supra*), it ceases to satisfy the definition of an overriding interest, whatever its former position (section 3 (xvi)). Section 20 (1) (a) confirms the distinction between overriding interests and interests protected on the register. Brickdale does not make this point (pp. 74 (i), 107 (i)). An easement does not generally satisfy the definition of a minor interest (section 3 (xv)). If the argument above as to the effect of section 19 is correct, it is, however, arguable, that an easement expressly granted by a registered proprietor is a minor interest until noted on the appropriate registers. Once noted, it ceases to satisfy the definition of a minor interest. Hence, like the unassignable lease, we have, in the easement noted on the register, or protected by notice, an interest which falls within a fourth class of rights, being neither registrable as a title, nor overriding, nor minor. No contrary argument seems possible on the basis of the alternative definition of minor interests in section 3 (xv). Such interests appear to remain minor interests after noting, if they would have been overriden had they not been noted, but this only applies to interests which could not be created or disposed of by registered dispositions. It is true that an express grant by a registered proprietor of an easement does not take effect as a registered disposition until a note is entered on the register (section 19 (2), last paragraph). But it seems a curious formulation to say that until such noting the easement was not "capable of being created by a registered disposition." The use of the "prescribed form" (referred to in section 18), *e.g.*, Land Registry Form 20 or 32b with its Schedules of Easements, would seem to make it clear that the easement was being created by way of registered disposition under sections 18 and 19. In such a case section 109 would make the disposition operate as a registered disposition and not as a deed off the register within section 101. Delay in registration would not alter this fact. In the compulsory area L. R. A., section 123, reduces to equitable interests any interests still unregistered for two months, but does not apply to easements, as such, though it would avoid the whole conveyance if it also amounted to a conveyance of land. There seems to be no corresponding provision in the voluntary area, where title is in fact registered, though the protection of an official search (Form 94) would be lost unless renewed for good cause after fifteen days. Further delay would enable the grantor or vendor to confer a good title on a third party under section 20 (1). This would forfeit the easement unless the third party provided no value (section 20 (4)). Still, it is difficult to argue that the easement, if otherwise capable of being a legal easement,

was not "capable" of being created by way of registered disposition.

(5) LEGAL MINOR INTERESTS. A minor interest is not necessarily equitable, though it will usually be equitable. Professor Potter frequently pointed out that L. R. A., section 2 (1), only converts into equitable minor interests those interests which are incapable of being legal estates. It is true that section 101 (3) appears, at first sight, to lay down a general rule that all minor interests should take effect in equity. On the other hand, owing to section 109, if a legal minor interest can be created under any other Part of the Land Registration Act, section 101 will not apply to it. On principle some legal interests do satisfy the definition of minor interests, but it is difficult to find many examples. A purported registered charge by way of legal mortgage (Form 45) creates a legal interest, though it may lose its priority under section 27 (3) if not registered. Registration of the charge under L. R. A., section 26, appears to have the same effect as under L. C. A., 1925, section 10, and it does not affect its inherent validity if it is not registered. Section 27 (3) appears very clear on this. It says the charge takes effect by way of legal mortgage from the date of delivery of the deed, although it provides for loss of priority in favour of a subsequent chargee who registers first. A personal representative acquires a legal interest in land, as we have seen, and this may be a minor interest, where he does not himself apply for registration (section 37). Other examples of legal minor interests will probably come to light in the course of time.

THE ASSIGNMENT OF A WEEKLY TENANCY

By A. Kiralfy, Barrister-at-Law

Dr. Walford has recently ventilated an important practical point on which there appears to be no direct authority (15 *Conveyancer* 307). Can a weekly or monthly tenancy be assigned under the general law? If the landlord has imposed a " qualified " covenant against assigning such a tenancy, can he ever be acting unreasonably in refusing his consent to such an assignment? (If he imposes an " absolute " covenant against assignment this appears quite clearly to prevent any assignment.)

In former times this question was academic. A new tenant would hardly move his home for a week or a month. He would start off with a lease for a year or more, though he might well hold over, after it expired, as a periodic tenant, with the landlord's consent. Again, since a landlord could get rid of his tenant by serving notice, a substitution of a new tenant would usually take the form of a new tenancy rather than an assignment of the existing tenancy. Furnished lettings would generally amount to a mere licence to occupy premises, or special provisions would be made about assignment.

At the present time the question is one of great importance. There are a large number of unfurnished lettings of premises within the Rent Restriction Acts. The landlord may render these tenancies unassignable by serving notice to the tenants to quit, after which they become " statutory tenants " and cannot assign their tenancies. But the Acts permit the tenants to ignore the notice to quit and to hold over as protected tenants. Hence landlords are reluctant to serve such notices, knowing they will not be obeyed and will only cause bad feeling. They may also rely on certain provisions of the Rent Acts (see *infra*) which enable them to get possession from assignees if the assignment took place without their consent. The result is that the tenant may assign, before or after eventually being given notice to quit, and the question turns on the effect of the general law of landlord and tenant, as well as on the special provisions in the Acts. The assignee obtains possession and the right to hold over under the Acts in some circumstances, and not merely a tenancy for one week or other short period.

It appears clear that a weekly or monthly tenancy is assignable unless its terms specifically provide to the contrary. Such a

tenancy is an interest in land, and a "term of years absolute" within the Law of Property Act, 1925, s. 1, being a term for a fraction of a year, or a term for less than a year. It was at one time argued that a periodic tenancy was not assignable, but Jessel M.R. in *Allcock* v. *Moorhouse* (1882) 9 Q.B.D. 371, held that a yearly tenancy was assignable, and his reasoning would apply to a shorter tenancy. That a weekly tenancy is too undignified to rank with other leases is no longer arguable. The grumblings of Scrutton L.J. in *Liddiard* v. *Waldron* [1934] 1 K.B. 435, about weekly tenants going about with easements appurtenant to their tenancies, for example, cannot stand after the decision in *Wright* v. *Macadam* [1949] 2 K.B. 744 (C.A.) (13 *Conveyancer* 392). Short tenancies are no different from others save where, as in the War Damage Acts, special provision is made for them.

The landlord, therefore, to prevent an assignment, must insert a contrary provision in the lease. A weekly tenancy, though it may in the result last for many years, even apart from the operation of the Rent Restriction Acts, is in law regarded as a series of single tenancies of one week each. Hence it requires no formalities for its creation, since leases at a rent for three years or less are saved by the Law of Property Act, 1925, s. 54. If it arises on the termination of an original lease for a fixed term, in which the right to assign was excluded, the subsequent short tenancy will presumably not be assignable, being held on such of the original terms as are consistent with the new period of the tenancy. (Cheshire, Real Property (6th ed., 1949), 146.)

If it is a weekly tenancy from the beginning, parol evidence is admissible to prove the terms of the tenancy. It is unlikely that any verbal arrangement was made on the subject of assignment. The lease may be in writing or on a printed form, and in such a case a provision about assignment will probably be made. In many cases the tenant goes into possession and receives a rentbook. If the rentbook is delivered at the time of the letting the tenant will hold on the terms printed or written in the rentbook. If he receives the rentbook after the tenancy has begun, he will hold thenceforward on the terms printed or written in the book. If he objects to them the tenancy will be terminated as the parties are no longer "*ad idem*" and each week is a new letting. These rules are clear in principle and are supported by some authority. A rentbook was treated as containing the terms of a tenancy in *Maley* v. *Fearn* [1947] L.J.R. 276 (C.A.). Morton L.J. (now Lord Morton), held that the tenant must be presumed to have acquiesced

in the terms printed in a rentbook, one of which was a term prohibiting sub-letting without the landlord's consent. A dictum of Somervell L.J. in *Mint* v. *Good* (1950) 66 T.L.R. (Pt. 2) 1113, is not really against this. He held that the printed matter in a rentbook was not shown to be the basis of the original contract of tenancy, but in that case the rentbook was from a period later than that when the dispute arose, and was no evidence of the terms of the tenancy at that earlier time. A rentbook used in 1950 might well contain different terms from that used in 1949. In *Lace* v. *Chandler* [1944] K.B. 368, a few words written in a rentbook were regarded by the Court of Appeal as a term of the tenancy. Lord Greene, then M.R., pointed out, "The agreement between the parties was partly oral and partly in writing. The written terms are to be found in the rentbook; the oral terms were referred to in evidence." This proposition is also stated in Megarry, The Rent Acts (1951), 163, on the assignability of contractual tenancies.

It is generally agreed that an assignment of a tenancy, however short the tenancy, requires a deed. The Law of Property Act, s. 53, authorises assignments in writing of interests in land, but this may refer to equitable interests. Section 54 requires a deed for any conveyance of a legal estate, and technically an assignment of a weekly tenancy seems to fall under this rule. As between the parties to an assignment for value this rule would be overridden by equity. It is doubtful whether the landlord would be bound to recognise the assignee, unless he accepted rent from him or in some other way committed himself, *e.g.*, by giving licence to make the assignment. This point is interesting, since the use of a deed in such a case is most improbable.

Technically, an informal assignment of a tenancy is an estate contract, as a contract by an "estate owner" (which has been interpreted to mean any owner of a legal interest, *e.g.*, a yearly tenant, *Sharp* v. *Coates* [1948] 2 All E.R. 871) to convey a legal estate (his tenancy). A purchaser from the landlord might well argue that he was not bound to respect the assignee's tenancy unless the assignment had been under seal, since such estate contracts are void in favour of purchasers (Land Charges Act, 1925, s. 13; Law of Property Act, 1925, s. 199). The same problem might arise where the tenant executed a subsequent formal assignment to another assignee. The first assignee is not protected even if in actual possession of the land, as actual notice is immaterial (*Coventry Building Society* v. *Jones* [1951] 1 All E.R. 901).

Dr. Walford has pointed out that the shortness of the tenancy cannot logically justify the landlord in refusing to give his consent to an assignment, where the tenancy is subject to a "qualified"

covenant against assignment. Otherwise the covenant would be turned automatically into an " absolute " covenant against assignment. A landlord would be acting unreasonably in withholding his consent, in the case of the " qualified " covenant against assigning without consent, under the Landlord and Tenant Act, 1927, s. 19 (1). A few words might be added, to distinguish the cases in which the tenant of a fixed term has tried to assign at the very end of the term. In *Swanson* v. *Forton* [1949] Ch. 143, and *Dollar* v. *Winston* [1950] Ch. 236, the courts have held a landlord entitled to withhold his consent to an assignment, under a " qualified " covenant against assignment, where the assignment was staged at the very end of the term. The object of the tenant in such cases is to put the assignee into possession under a contractual tenancy, so that the assignee may claim the protection of the Rent Restriction Acts, a protection which the tenant assignor has no desire to claim. In the leading case of *Bates* v. *Donaldson* [1896] 2 Q.B. 241, it was held that a landlord could not refuse his consent to an assignment simply in order to get premature possession of his land. In such a case a lease might be granted for twenty-one years and a tenant might be compelled to leave the premises after a few years. The landlord is not entitled to end the lease prematurely by refusing the tenant the right to assign. This is especially just where the tenant paid a considerable premium at the time the lease was granted. Now in *Swanson* v. *Forton* (*supra*) and similar cases, the landlord is not trying to get possession until the natural expiration of the lease. He is also in this difficulty: Where a lease is for a fixed term the landlord cannot serve any notice on the tenant, simply because the term is fixed. In the case of a periodic tenancy the landlord can always give notice to the tenant and prevent the problem arising. Dr. Walford considered (*ubi supra*, p. 308) that the landlord's power to end the tenancy might be a reason why the tenancy should not be assignable. It might equally well be argued that his failure to terminate it was a reason why it should be assignable. In any case the position is clearly distinguishable from the position under a lease for a fixed term, unless the landlord has reserved power to " break " the term by notice (*cf.* Foa, Landlord and Tenant (7th ed.), pp. 94, 581).

That the " rump " of a long term of years is in a rather special legal position is confirmed by other rules. Thus the Landlord and Tenant Act, 1927, s. 19 (1) (b) avoids any attempt to make a long building lease unassignable except during the last seven years of the term. The relief given tenants under the Leasehold Property (Repairs) Act, 1938, s. 1, applies to long leases only where at least five years of the term is unexpired. The reason for these

special exceptions is probably the landlord's right to serve a bill of dilapidations and have the premises put in repair at the end of the term. The original lessee is still liable under the lease but may be out of reach or untraceable. A mesne tenant may assign the balance of the term to a man of straw and thus escape personal liability. The Law of Property Act, 1925, s. 77, and Schedule 2, II and IX, make provision for indemnification by circuitous means, and the ultimate assignee might assign his rights to the landlord and bring home the liability to those persons who are responsible for the disrepair, to the extent of their individual defaults, but this is a long and awkward business. Hence the right of a tenant under a long term to make a last-minute assignment must be read in the light of these rules. Such a problem does not arise in the case of a weekly or monthly tenancy. The tenant does not usually execute repairs, because of the " precarious " nature of his tenancy (though the Rent Restriction Acts, *de facto*, make this seem ironic). The landlord seldom receives enough rent to enable him to do repairs. Since the assignee will not be expected to do repairs, the landlord can hardly have much objection to his financial position, whereas he might well do so in a projected assignment of the " rump " of a long lease. The Court of Appeal in *Mint* v. *Good* [1951] 1 K.B. 517 recognised the fact that weekly tenants do not carry out repairs, though they stopped short of implying any definite duty on the landlord to do them. Of course the landlord could always object that a proposed assignee was of insufficient means, in refusing his consent under the " qualified " covenant, but this point does seem to distinguish the position of long and short tenancies.

Under the Rent Restriction Acts it is material whether a tenant is permitted to underlet by the terms of his tenancy, but it is not important whether those terms permit him to assign or not. This is because the object of the Acts is to protect tenants from eviction and not to give them an interest " in gross " which they may dispose of to other persons. Schedule I to the Act of 1933 enables the court to make an order for possession in favour of a landlord where the tenant has assigned the lease without his consent, even if the terms of the tenancy do not make any provision that his consent is needed. The principle was explained by the Court of Appeal in *Regional Properties* v. *Frankenschwerth* [1951] 1 K.B. 631. The tenant may assign the tenancy with perfect freedom so as to transfer the balance of the original term to the assignee, in such cases, but he cannot pass to the transferee the right to claim the protection of the Acts at the end of the term in so full a measure as himself. In the case of a weekly or other short periodic tenancy

the landlord is in a stronger position, since he may serve notice on the assignee at once, and then sue for possession, even if the original terms of the tenancy permit assignment.

The fact that a landlord may apply for possession under the 1933 Rent Restriction Act may explain why there is so little authority in this field in the general law. But the principles on which this jurisdiction is exercised are different from those under the Law of Property Act and the Landlord and Tenant Act. Under the Law of Property Act the landlord may prematurely forfeit the lease, which is not possible under the Rent Restriction Act. In practice, however, a landlord would serve notice on a weekly tenant who broke the terms of the tenancy, and obviate the formalities entailed under the Law of Property Act, s. 146. He would follow this up by suing for possession. In effect the position would be much the same as under the Rent Restriction Act, under a weekly tenancy. The Landlord and Tenant Act gives the tenant some protection against forfeiture, by preventing a breach of covenant occurring, in that it enables the tenant to assign without the landlord's consent by refusing to allow the landlord to withhold his consent. The court may relieve the tenant under section 146 of the Law of Property Act but would hardly grant relief in favour of an assignee, where the assignment constituted the breach of covenant. Under the Rent Restriction Act the court also has a wide discretion. It has jurisdiction to give the landlord possession against any assignee of the tenancy, but will not necessarily exercise that jurisdiction in the landlord's favour. If the landlord has recognised the assignee, *e.g.*, accepted rent from him, he will probably lose the right to an order for possession. If the landlord has licensed or waived a number of earlier assignments he may also be refused an order. There is an interesting analogy between the exercise of the court's discretion in this case and in permitting an assignment under the Landlord and Tenant Act, 1927. In *Regional Properties* v. *Frankenschwerth* (*supra*), a monthly tenant was given a month's notice to quit and assigned his monthly tenancy when only three days of the tenancy were left. The landlord recovered the premises from the assignee. These facts are very similar to those in *Swanson* v. *Forton* (*supra*), decided under the Landlord and Tenant Act. The assignee in *Frankenschwerth's Case* had been in occupation as a sub-tenant of furnished accommodation. The monthly tenant had no wish to resist eviction at the end of the notice, by claiming the protection of the Rent Restriction Acts. Had the underletting been unfurnished the sub-tenant could have held over under the Acts, since the underletting was "lawful", as not being prohibited by the terms of the head-tenancy. In the actual circumstances he

faced eviction, and the underlessor tried to protect him by making an assignment of the head tenancy.

The date of notice is important. Had the notice expired before the assignment the assignment would have been ineffective, since the tenant would have been reduced to the status of a "statutory tenant," who has nothing to assign. In *Frankenschwerth's Case* the notice was served before the assignment though it did not expire till later. But the principle of the case would cover an assignment before any notice was served. Lloyd and Montgomerie on Rent Control, p. 124, confirm this point, quite apart from the case cited. It is felt, however, that the court might be less sure to evict the assignee in such a case than in the blatant circumstances in that case, although they have jurisdiction to do so.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Licence with a contractual right to remain—occupation conditional on payment being made to a third party.—Errington v. *Errington* [1952] 1 All E.R. 149, is a case of considerable interest. As Somervell L.J. said: "The transaction in the present case, although it seems a not unnatural one, is, so far as the researches of counsel and ourselves have gone, legally novel." The facts were as follows: a father bought a house for his son and the son's wife to live in, and for which he paid £250 in cash, this sum the father told the son and the son's wife they could regard as a present. Nevertheless the father had the house conveyed into his own name and he then borrowed £500 from a building society giving the house as security, the money lent was to be repaid by instalments of 15s. a week. The father then handed the building society book to his son's wife and said that when she and her husband had paid off all the instalments the house would be theirs. From this time onwards all the instalments were paid by the son's wife as they fell due with money given to her by her husband.

In 1945 the father died leaving the house to his widow by his will and soon after this the son left his wife, who however, continued to live in the house. The widow then claimed possession of the house in the county court where it was held that the son's wife was a tenant at will and that the widow's claim was statute barred.

Denning L.J., with whom the other Lords Justices agreed, held that the father's promise was a unilateral contract, for he had promised the house to the son and his wife in return for their act of paying the instalments. The contract could not be revoked by the father once the son and his wife had started to perform their side of it, but it would cease to bind him or his estate if the son and his wife left it incomplete or unperformed. In deciding what was the effect of the law on these facts the Lord Justice came to the following conclusions:—

1. The son and his wife were not tenants at will paying no rent since the tenancy was not determinable on the demand of either party and the fact that it should be so determinable was, his Lordship thought, of the essence of a tenancy at will (*cf. Lynes* v. *Snaith* [1899] 1 Q.B. 486, which in his Lordship's opinion would be decided differently today).

2. That the son and his wife were not tenants at a rent of 15s. a week, for the 15s. could not possibly be regarded as a rent since they were not bound to pay it.

3. That the son and his wife were licensees with at least an equitable right to remain so long as they paid the instalments, and that this right would become a good equitable right to the house itself once the mortgage was completely paid off.

In coming to this decision Denning L.J. pointed out that the test of exclusive possession was by no means decisive and that it had taken 100 years for the words of Lord Abinger in *Howard* v. *Shaw* (1841) 8 M. & W. 118, to be proved correct, where he said: "While the defendant occupied under a valid contract for sale of the property to him he could not be considered a tenant." The first case to show this was *Booker* v. *Palmer* [1942] 2 All E.R. 674, which had since been followed in many other cases which all showed that the occupier was a licensee and not a tenant even though he had exclusive possession. All these subsequent decisions had been much influenced by the words of Lord Greene in *Booker* v. *Palmer*, when he said, at p. 677: "There is one golden rule which is of very general application, namely, that the law does not impute intentions to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

Denning L.J. then pointed out that the son and his wife in the case before him were not bare licensees, but, as a result of the fusion of law and equity, licensees with a contractual right to remain (*Winter Garden Theatre (London), Ltd.* v. *Millennium Productions, Ltd.* [1946] 1 All E.R. 680, *per* Lord Greene M.R. and [1947] 2 All E.R. 336, *per* Lord Simon), and that it was the same in the case of a breach of a promise on which the licensee had acted although he gave no value (*Foster* v. *Robinson* [1950] 2 All E.R. 346). His Lordship then explained *Rogers* v. *Hyde* [1951] 2 All E.R. 79, and disapproved of Roxburgh J.'s decision in *Thompson* v. *Earthy* [1951] 2 All E.R. 235 (see note in Vol. 15, p. 271).

The position, said Somervell and Denning L.JJ., was analogous, but not identical, to that of a purchaser in possession under a contract of sale, and though the question was not before the court, Somervell L.J. thought that there was a right to call for a conveyance when the time came, for although the contract was oral the doctrine of part performance would clearly apply.

Execution of deed—sealing—option given to purchase land—donee not a party to the deed—section 56 (1), *Law of Property Act,* 1925.—While taking the line that might be expected, the decision of Danckwerts J. in *Stromdale & Ball, Ltd.* v. *Burden* [1952] 1 All E.R. 59, is interesting on more than one point.

The defendant had sublet for three years part of a house in which she had a leasehold interest, and by deed two years later she gave a licence to the sub-tenants to assign their interest to the plaintiff company. By a subsequent clause in this deed she gave the plaintiff company an option to purchase her interest in the house on giving 14 days' notice during the term of the sub-tenancy. The plaintiff company had been joined in the deed as sureties for the rent only.

The learned judge having decided that the defendant knew that there was an option contained in the deed, dismissed the point that

the document had been merely signed by the defendant without any act amounting to sealing. He said: "Time was when the placing of the party's seal was the essence of due execution. . . . Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that at the present day if a party signs a document bearing wax or wafer or other indication of seal with the intention of executing the document as a deed, that is a sufficient adoption or recognition of the seal to amount to due execution as a deed."

The learned judge then dealt with the argument that the plaintiff company were not parties to the deed of licence and therefore the grant of the option was *res inter alios acta*, which the plaintiff company could not enforce, notwithstanding section 56 (1) of the Law of Property Act, 1925. He referred to *Forster* v. *Elvet Colliery Co.* [1908] 1 K.B. 629, *sub nom. Dyson* v. *Forster* [1909] A.C. 98 and *Grant* v. *Edmondson* [1931] 1 Ch. 1, in which respectively the Court of Appeal had been of the opinion that section 5 of the Real Property Act, 1845, and section 56 (1) of the Law of Property Act, 1925, were confined in their operation to covenants touching and concerning the land. An option to purchase the freehold reversion of a lease was held to be not such a covenant in *Woodall* v. *Clifton* [1905] 2 Ch. 257.

However, the learned judge decided that section 56 (1) nevertheless did operate in favour of the plaintiff company, and he referred to the words of Sir George Jessel M.R. in *London and South Western Ry.* v. *Gomm* (1882) 20 Ch.D. at p. 581, as showing that an option over land creates an equitable interest in it, and also to the words of Simonds J. and Sir Wilfrid Greene M.R. in the Court of Appeal in *White* v. *Bijou Mansions* [1937] 3 All E.R. 269; [1938] 1 All E.R. 546, where the former said, at p. 277: "Just as, under section 5 of the Act of 1845 only that person could call it in aid who, although not a party, yet was a grantee or covenantee, so under section 56 of this Act, only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, . . ." Danckwerts J. then distinguished *Woodall* v. *Clifton* (*supra*) on the ground that in the present case no assignment of either option or interest had been made, and also noted that in the present case no question of invalidity on the ground of remoteness could arise (*cf. Woodall* v. *Clifton* (*supra*) and *Gomm's Case* (*supra*)).

The learned judge finally decided that, apart from any consideration of section 56 (1), a specifically enforceable contract had been made between the parties to the action, the defendant's offer of the option had not been revoked and had been accepted by the plaintiff company.

Trustee—trust corporation—right to withhold documents from successors in office.—In *Tiger* v. *Barclays Bank* [1952] 1 All E.R. 85, the Court of Appeal made some general observations on the extent of the duty of trustees corporate and natural to produce documents for inspection or possession of their successors in office. The appeal

itself was dismissed on the ground that this question had never been pleaded or argued, nor evidence adduced at the trial (see note, vol. 15, p. 278), and these being substantial and not technical reasons, the appeal could not properly be entertained by the court.

Jenkins L.J., in reading the judgment of the court, explained that the defendant bank objected whether the relevant documents were produced for inspection or for delivery up of possession and therefore they would use the word "production" as a neutral term. He then made the following points:—

1. If a natural executor or trustee reduces his mental deliberations on matters concerning the trust into writing, "as, for instance, by recording them in a diary relating to the administration of the estate or trust, we see no reason in principle why he should not be required to produce it to his successors in office . . ." and it is the same where two or more natural trustees record their deliberations in minutes of trustees' meetings.

2. The internal correspondence and memoranda of a corporate trustee is not as such necessarily exempt from production. Any document relating to the administration of an estate or trust is potentially a document which might assist a new trustee in carrying out his duties, and he upon seeing each individual document is the best judge of whether it in fact will do so. Accordingly, there seemed to the court from a practical point of view to be little, if any, substance in a partial and imprecisely defined exemption of such documents.

3. ". . . where a trustee corporation fills the double capacity of trustee and banker its successors in the trust should, at all events, be in no worse position as regards the obtaining of information with respect to the trust bank account than they would have been in if a third party had been the banker."

Trustee shareholders and directors—right of beneficiaries to inspect company's documents.—B. had a substantial interest in the residuary estate of a testator. The estate consisted partly of shares in a private company which the testator had formed himself and in which he held all save two of the ordinary shares to which voting power was confined. The two remaining shares were vested in the two other directors of the company whom the testator appointed his executors and trustees together with a third person who was also made a director after the testator's death. B. was not a registered shareholder of the company, but because he was dissatisfied with the way the business was being run, he wished to see all the documents which came into the trustees' hands as directors, as well as those which an ordinary shareholder of the company was entitled to see under the company's articles and which the directors were willing to let him see.

These were the facts in *Re Butt* [1952] 1 All E.R. 167, in which on appeal from Harman J. the Court of Appeal held, *per* Romer L.J., "that the beneficiaries are entitled to be treated as though they were registered shareholders in respect of trust shares with the advantages and disadvantages (*i.e.*, restrictions imposed by the articles) which

would be involved in that position and that they could compel the trustee directors, if necessary, to use their votes as the beneficiaries—or as the court, if the beneficiaries themselves are not in agreement—should think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose."

The learned Lord Justice appreciated that where all the shares in a company are held by one beneficiary, or two or more who all agree to an inspection, it would be very wrong if the directors could, by virtue of the trust property being shares in a company and not only in a business (*cf. Re Cowin* (1886) 33 Ch.D. 179), set the beneficiaries at defiance. On the other hand, if a right to inspect all documents were allowed in most cases, it would be very unfair to the other beneficiaries if they disagreed to this procedure and also to other shareholders of the company who could not themselves see the documents in question. Supposing, his Lordship suggested, that the beneficiary wished to set up a rival business, he could take advantage of secret processes used by the company in its own business by compelling disclosure of them to him. He therefore rejected such a principle as difficult to apply and dangerous in its consequences, and suggested that B., now his true position was ascertained, should in these circumstances, as a short circuit to compelling the directors to exercise their voting powers in his favour, simply ask for each document he required making out a proper case for seeing them, and, in the absence of a valid objection by the directors or the beneficiaries, inspection should be allowed.

Appointment of new trustees—removal of bankrupt solicitor from trusteeship of client's account—Trustee Act, 1925, *s.* 41 (1).—Section 41 (1) of the Trustee Act, 1925, was called in aid by Roxburgh J. in *Re a Solicitor* (1951, M. No. 234) [1952] 1 All E.R. 133, in order to remove a bankrupt solicitor from his trusteeship of a client's account and appoint new trustees in his place.

Subsequent to the solicitor's bankruptcy the Council of the Law Society had, in pursuance of para. 5, Sched. I of the Solicitors' Act, 1941, applied for and obtained an order that no payment should be made out of any account of the bankrupt, including a client's account, with the bankers in question. Nobody knew what to do next in respect of the client's account as there was no statutory provision covering the case, and so the trustee in bankruptcy applied to the court that he might be at liberty to pay out moneys out of any account covered by the stop order.

Roxburgh J. held, following dicta in *Plunkett* v. *Barclays Bank* [1936] 1 All E.R. at p. 657, and *Loescher* v. *Dean* [1950] 2 All E.R. at p. 126, that the chose in action represented by a client's account opened under section 1 of the Solicitors Act, 1933, is property held by the bankrupt on trust for another person within the meaning of section 38 (1) of the Bankruptcy Act, 1914, and accordingly does not vest in the trustee in bankruptcy under section 18 of that Act. Criticising the use of the words "trustee in the full sense of the term" he said: ". . . the truth of the matter is that, as the principles of equity permeate the complications of modern life, the nature and

variety of trusts ever grow, and it is, perhaps, rash to think of some conception of a trust having certain characteristic attributes and then to say that a trust which lacks one or some of these attributes is not a trust in the full sense."

The learned judge then went on to say that in these circumstances (*i.e.*, there being no express statutory provision for winding up a client's account) that section 41 of the Trustee Act, 1925, provides a satisfactory solution to the problem, except for the unavoidable difficulty that a trustee so appointed cannot charge for his services. He referred to *Re Henderson* [1940] 3 All E.R. 295, in which Bennett J. came to this conclusion *obiter* on the same point, and said that he (Roxburgh J.) saw no reason why once the solicitor had been adjudicated bankrupt, the stop order should not be removed simultaneously with the appointment of new trustees in the solicitor's place.

Shifting clause—validity—uncertainty.—The House of Lords in *Bromley* v. *Tryon* [1951] 2 All E.R. 1058, affirmed the decision of the Court of Appeal (*sub nom. Re Wilson's Will Trusts* [1950] 2 All E.R. 955; see note, Vol. 14, p. 400 *d*). The House was asked to determine the validity of a shifting clause created by will in terms "which had for nearly a hundred years passed unchallenged by conveyancers" and similar to that now contained in Key & Elphinstone, 14th ed., Vol. 2, at p. 736.

As the facts of the case are extremely lengthy, it will be sufficient to say that the clause was mainly attacked in the House of Lords on the grounds that a condition subsequent "must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine" (*Clavering* v. *Ellison* (1859) 7 H.L.Cas. 725, *per* Lord Cranworth). It was alleged in *Bromley* v. *Tryon* (*supra*) that the clause was void for uncertainty as the event upon which the interest in the devised property was to determine was that the beneficiary should become entitled to another estate "or the bulk thereof." However, their Lordships, having approved the decision of the Court of Appeal on the other points raised before them, unanimously agreed, distinguishing *Clayton* v. *Ramsden* [1943] A.C. 320, and *Sifton* v. *Sifton* [1938] A.C. 656, that "bulk" means quite clearly anything more than half, and in this context more than half in value and not in size or area. As Evershed M.R. observed on this point in the Court of Appeal (at p. 964), "No doubt, this elaborate formula is not easy in some respects to construe, but to say that a document is difficult of construction is not the same thing as saying that it is so vague and obscure as to be unintelligible, and therefore unenforceable."

Perfecting incomplete gift by appointment of donee as executor—intention to give out and out.—"The principle of *Strong* v. *Bird* (1874) L.R. 18 Eq. 315 is directed to perfecting gifts complete in all respects except as regards the legal formalities necessary for the proper transfer of title to the particular property in question. . . .

Surely there can be no room for its application in a case where there is an intention to give, but the gift is not completed because the intending donor desires first to apply the subject-matter of the contemplated or proposed gift to some other purpose." These are the words of Jenkins L.J. in *Jackson* v. *Rodger* [1952] 1 All E.R. 16, in which the Court of Appeal held that the rule in *Strong* v. *Bird* (*supra*) did not apply.

For the rule to apply there must be an intention at the time the gift was made to give out and out, as distinguished from an intention merely to give at some time in the future. The latter intention is not sufficient as it would allow a man to dispose of his property after his death by a non-testamentary document. In making this distinction, Evershed M.R. criticised the headnote in *Re Stewart* [1908] 2 Ch. 251, as being equivocal and approved the observations of Parker J. in *Re Innes* [1910] 1 Ch. 188 at p. 193.

The subject-matter of the gift in the present case was a motor-car, which it was not suggested was other than within the *Strong* v. *Bird* principle. The testatrix, who subsequently appointed both plaintiff and defendant executrixes, had promised the car to the plaintiff as soon as she had ceased to lend it to the defendant. As Evershed M.R. observed, "the contest in these proceedings has arisen from the amiability of the testatrix."

Estate agent's commission—vendor's failure to proceed against a defaulting purchaser not a breach of duty to agent.—"Where the basis of a contract is that the commission is payable out of the purchase price or when the purchase price is paid, that involves that the purchaser must remain able and willing to complete up to the time of completion. The only occasion on which the commission is payable if the money is not paid is when the non-completion is due to the fault of the vendor": *per* Somervell L.J. in *Boots* v. *E. Christopher & Co.* [1951] 2 All E.R. 1045 at p. 1048.

In this case, the Court of Appeal without hesitation agreed that on the construction of the contract the commission was only payable when the purchase price was paid (the agents had agreed to "find a purchaser"); but the purchaser had defaulted before completion and the plaintiff (the vendor) having accepted the forfeiture of the deposit, sought to recover it from the agents who were stakeholders. The agents (the defendants) resisted their claim and alleged that the plaintiff was at fault in not proceeding against the purchaser for damages or specific performance, and thus enable the defendants to recover their commission; but the court adopted Denning L.J.'s dictum in *Dennis Reed, Ltd.* v. *Goody* [1950] 2 K.B. 277, and applying *Beningfield* v. *Kynaston* (1887) 3 T.L.R. 279, held that there was no such duty as the terms of the contract had not been carried out (*i.e.*, the defendants had not "found a purchaser").

Denning L.J. pointed out that had the plaintiff proceeded against the purchaser, the defendants could have recovered their commission under an implied contract only. Also, had the defendants claimed reasonable remuneration in the present action [as in *Beningfield* v. *Kynaston* (*supra*)] or had the plaintiff sued the purchaser and

recovered less than full damages, the defendants might well have been successful in recovering from the plaintiff a smaller sum, similarly under an implied contract, to the extent to which the plaintiff had taken the benefit of their services.

Sale of land—principal and agent—fraud.—In *Armstrong* v. *Strain* [1952] 1 All E.R. 139, the Court of Appeal decided between the conflicting views of Devlin J. at first instance (see note, vol. 15, p. 186), and Atkinson J. in *Anglo Sugar Beet Corporation, Ltd.* v. *Spalding Urban District Council* [1937] 3 All E.R. 335, as to what was the decision of the Court of Appeal in *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.* [1936] 2 All E.R. 1039. Criticising the vagueness of the latter case and remarking (*per* Birkett L.J.) that "nowhere do the lords justices seem to be impressed by the novelty or the vast importance of their decision," the Court of Appeal preferred the view of Atkinson J. They held that the *London County Properties Case* (*supra*) decided that "a principal is liable for fraud where the fraudulent information supplied by one agent is handed to a third party through an innocent agent," and amounted in fact to a finding of fraud on the part of one, Addis, an agent of the defendant company.

Therefore, the conflict which Devlin J. saw in *Armstrong* v. *Strain* ([1951] 1 T.L.R. 856) between the *London County Properties Case* (*supra*) and *Gordon Hill Trust, Ltd.* v. *Segall* [1941] 2 All E.R. 379, does not exist, though the decision that Devlin J. came to by following the latter case still stands, *viz.*, that in the absence of actual fraud or dishonesty on the part of a principal, his knowledge of facts which make false a statement made innocently by his agent, does not make him liable for fraud.

Their Lordships in affirming the decision of Devlin J. on all other points, re-emphasised the importance of the principles laid down in *Derry* v. *Peek* (1889) 14 App.Cas. 337, and *Nocton* v. *Ashburton* (*Lord*) [1914] A.C. 932, where Lord Parmoor said, at p. 978, ". . . in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving *mens rea*, must be proved."

Forged mortgage—estoppel.—*M'Kenzie* v. *British Linen Bank* (1881) 6 App.Cas. 82, has been applied by the Judicial Committee in *Fung Kai Sun* v. *Chan Fui Hing* [1951] A.C. 489, on facts which their Lordships found to be indistinguishable. In the latter case the respondents had for their own purposes delayed in informing the appellant that mortgage deeds purporting to be made over the respondents' property were forgeries. It was held that, although the respondents had taken the risk of incurring an estoppel by not informing the appellant as soon as the forgeries came to the respondents' notice, the plea of estoppel could not be effectively asserted as the appellant had suffered no detriment from the respondents' delay. Lord Reid said, at p. 503, "it must be held that the respondents were not

entitled to withhold from the appellant information that the appellant's mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that these deeds were forged if by reason of their keeping silent the appellant suffered detriment." In deciding what constitutes "detriment" within this principle, the court adopted the words of Lord Watson in *Ogilvie* v. *West Australian Mortgage and Agency Corporation* [1896] A.C. 257, who said, at p. 268, "the ground upon which the plea of estoppel" rests is "the fact that the customer" (here the respondents) "being in exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovery from the forger had been materially prejudiced." In the present case the forger had absconded and it could not be said that during the period the respondents had withheld the information, the appellant's chances of recovering from the forger had been materially diminished.

Settlement—compensation for damage to estate by military occupation—casual profit.—In *Re Pomfret's Settlement* [1951] 2 All E.R. 951, compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (b), had been paid to a tenant for life for damage done during military occupation to a house comprised in the settled estate. Roxburgh J., with great reluctance, held that he was bound by the decision of Sargant J. in *Re Williams* [1922] 2 Ch. 750, a similar case concerning the application of money paid under the Indemnity Act, 1920, and therefore the compensation was a casual profit and belonged to the tenant for life in equity.

Relative priorities of jointress and portioners where settled estate insufficient.—In *Re Keele Estates* [1952] 1 All E.R. 44, a settled estate was heavily charged with estate duty and there was a possibility of a deficiency. The deceased tenant for life had by deed in 1931 appointed portions, as he was empowered to do under the settlement, in favour of the children of his first wife. He had at this date already married a second time. By his will made in 1949 he appointed a jointure rentcharge in favour of his second wife.

Roxburgh J. decided that if there was a deficiency the "jointuress" (sic) and portioners should rank *pari passu*. He said: "I cannot but think that if a person subjects property to charges which are to take effect at the same time and nothing is said directly or indirectly about priority, on the general principle of equity—that, if there is a deficiency which nobody who drafted the instrument expects—the only thing you can do is to apportion the burden of the deficiency."

Capital profits dividend—claim for apportionment—no breach of trust.—*Re Kleinwort's Settlement Trusts* [1951] 2 All E.R. 328 (see vol. 15, p. 270) has been followed in *Re Rudd* [1952] 1 T.L.R. 44;

[1952] 1 All E.R. 254. It may be remembered that in *Re Sechiari* [1950] 1 All E.R. 417, Romer J. held that the capital profits dividend issued by Thomas Tilling, Ltd., was to be distributed as income in the hands of trustees. Vaisey J., in *Re Kleinwort's Settlement Trusts* (*supra*) decided that there was no equity to direct an apportionment of such sums between capital and income except probably where the court was repairing a breach of trust, and Harman J. agreed with this in *Re Maclaren's Settlement Trusts* [1951] 2 All E.R. 414.

In *Re Rudd* (*supra*) the beneficiaries interested in capital under a trust for sale claimed they were entitled to an apportionment and alleged that the trustees had committed a breach of trust in not selling some or all of the trust holding in Thomas Tilling, Ltd., shares soon after the issue of the dividend was announced. Upjohn J. held that, although the trust instrument gave the trustees power to postpone sale and to retain existing investments for as long as they should think fit, that did not entitle them to treat the existing investments as authorised. Nevertheless, this did not mean by itself that they should have necessarily sold in this case. Except for the large sums involved, no reason had been shown why the stock should have been sold before it was quoted ex dividend, nor why it was wrong to allow the law to take its natural course.

The case therefore fell exactly within *Re Kleinwort's Settlement Trusts* (*supra*) and no apportionment was directed.

Contempt of court—resumption of possession after eviction by writ of possession.—In *Alliance Building Society* v. *Austen* [1951] 2 All E.R. 1068, Roxburgh J. committed the defendant to prison for contempt of court following *Lacon* v. *De Groot* (1893) 10 T.L.R. 24, which appears to be the latest and only authority on the matter.

The defendant in the present case had reoccupied a flat from which he had been evicted by the sheriff's officer, and, when a motion for committal was made by the plaintiffs, Roxburgh J. adjourned the application for one week on the defendant's promise that he had left the premises and would not return. On the resumed hearing he was still in occupation. While deciding that this was a proper case for the exercise of his jurisdiction, the learned judge strongly emphasised that the case must give no encouragement to this kind of motion, and that the normal procedure is by application *ex parte* to the master for a writ of restitution. (Annual Practice, 1951, p. 844.)

Forcible entry—Gas Act, 1948, *Sched. III, para.* 34 (1).—In *Grove* v. *Eastern Gas Board* [1951] 2 All E.R. 1051, the Court of Appeal affirmed the decision of Hilbery J. that the defendant board were not liable to the plaintiff in trespass for a forcible entry into the plaintiff's premises to collect money from the gas meter. The lords justices (Somervell, Jenkins and Hodson L.JJ.) thought that though there was more room for doubt as to what the position had

been under earlier legislation, yet para. 34 (1) of Sched. III of the Gas Act, 1948, when read in conjunction with paras. 35 (1) and (3) and para. 36, gave the irresistible conclusion that entry may be effected even though it has to take the form of a forcible entry.

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2. *CHARITIES*

By A. KIRALFY, Barrister-at-Law

Education—public benefit immaterial.—Re Shaw's Will Trusts [1951] 2 T.L.R. 1249; [1952] 1 All E.R. 49. The object of education is not primarily to impart information but to cultivate the person taught and make him or her a more useful member of society. In the present case Vaisey J. upheld the gift of residue of an estate to teach the Irish people elocution, deportment and other social graces, as a valid charitable bequest. He accepted the fact that in this field the intention of the testator is important, and that the court cannot judge the respective merits of rival types of education. The learned judge also refused to hold that these objects were too vague to be taught, or that there was any danger of the money being spent on mere pleasure and entertainment. The fact that the bequest was intended to encourage social life provided a public element in this case. The case of *Royal Choral Society* v. *I. R. C.* (1943) 112 L.J.K.B. 648, was a decision of the Court of Appeal in the same sense.

(Theobald 272.)

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3. *WILLS*

By A. KIRALFY, Barrister-at-Law

Will—probate—dependent relative revocation.—In the Estate of Bromham [1951] 2 T.L.R. 1149; [1952] 1 All E.R. 110. A will was duly executed in 1945. In 1949 the testator planned to execute a new will but his solicitor was ill and died and the testator then died, without any new will coming into existence. The 1945 will was found in a mutilated condition. The doctrine of dependent relative revocation was applied and the 1945 will upheld. It was held by Lord Merriman P. that no new will need in fact come into existence in such cases, and that the precise date when the earlier will was mutilated is immaterial. *In the Goods of Appelbee* (1828) 1 Hagg. Ecc. 143, was followed.

(Theobald 38.)

Will—probate—dependent relative revocation.—Re Botting [1951] 2 T.L.R. 1089; 2 All E.R. 997. In this case a later will was improperly executed and invalid. The earlier will was not found, but a draft of the earlier will was found. It was held that destruction of the earlier will could be presumed in the circumstances, and that the draft was admissible to probate under the doctrine of dependent relative revocation.

(Theobald 38.)

Family provision—precarious income—relief denied.—Re Charman [1951] 2 T.L.R. 1095. An application for maintenance was made by a widow under section 1 of the Inheritance (Family Provision) Act, 1938. She had received nothing under her husband's will. A voluntary pension granted her by his employers brought in the same amount as she had been receiving under a separation agreement before his death so that at the moment she was financially no worse off. Harman J. held that she had no grounds for relief. What if this pension were subsequently stopped ? A fresh application to the court would seem to be out of time under section 2 of the Act, and the provisions of section 4 do not seem to meet the case where an order is refused and the applicant's circumstances alter. It was accepted that there was no risk in the instant case, otherwise a nominal order could be made, to prevent time running.

(Theobald 76, 77.)

Executor—perfecting of title—Rule in Strong v. *Bird* (1874) L.R. 18 Eq. 315.—*Jackson* v. *Rodger* (see Property Cases).

(Theobald 103.)

Will—revocation—new partly inconsistent will.—Re Plant [1952] 1 T.L.R. 1; 1 All E.R. 78. This case involves three interesting points. A later will contained no revocation clause. Many of its provisions were similar to those in an earlier will. The main question was whether these were cumulative or alternative. Roxburgh J. applied the principle of *Tuckey* v. *Henderson* (1863) 33 Beav. 174, and held that legacies in almost identical terms must be treated as substituted for the legacies in the earlier will, and that the earlier will was to that extent revoked on the grounds of later inconsistent provision. There were five legacies in the earlier will not mentioned in the later. It was held that these remained effective and unrevoked. Both wills had in fact been admitted to probate. The third point turned on the construction of the wills. It was held that provisions of the earlier will might be used as aids in the construction of the composite will, though not themselves effectively dispositive. Thus,

the second will gave residue as "money." The earlier will referred to "residue of real and personal estate." It was held that real property passed under this residuary gift under the second will. The first will had also given money to St. John Baptist Church, Cardiff. The second will omitted the reference to the locality. Was the uncertainty cured ? In fact the Attorney-General did not contest the identification of the church, so the point was not decided.

(Theobald 121.)

Will—specific legacy—expense of getting in.—Re Fitzpatrick [1951] 2 T.L.R. 995; 2 All E.R. 949. This is a simple point. The Court of Appeal held in *Re Scott* [1915] 1 Ch. 592 that the legatee of specific chattels must pay the expenses involved in reducing them into possession. Harman J. therefore held that the legatee must pay for the freight and insurance of chattels abroad, and cannot claim payment out of residue. The case was contested on the strength of decisions which appear to have been erroneous.

(Theobald 573.)

Will—revocation—separate English and foreign wills—probate.—Re Wayland [1951] 2 All E.R. 1041. In this case an English testator executed a will in Belgian form, which was valid under Lord Kingsdown's Act, disposing of his Belgian estate. He subsequently executed a will in English form disposing of his English estate, but containing the usual revocation clause. Pearce J. held that this clause did not operate to revoke the Belgian will, since the testator was obviously keeping the two estates separate. The learned judge also held that the Belgian will was admissible to probate. The Judicature Act of 1932 (section 2 (1)) provides that a will may be proved in the English Probate Division even though the testator left no estate. It is not clear why this step was desirable in this case. There may be cases where probate is desirable though a testator has no assets anywhere, *e.g.*, to facilitate actions in tort or under the Fatal Accidents Act, 1846, s. 5, where the proceeds of the action will accrue to the estate. It may also be desirable to forge a chain of representation to a testator whose executor the present testator was (A. E. A., 1925, ss. 5, 7 (3)). The present testator was English and the Belgian courts might consider the English court the proper forum to grant representation in the first place. If Belgian law required the English form to be used, the production of probate would satisfy them that the form used satisfied English law, more easily than an argument as to the effect of Lord Kingsdown's Act. For the application by Belgian law of the law of nationality, see *Collier* v. *Rivaz* (1841) 2 Curt. 855. Foreign estate had been held to be "no estate" in cases prior to the Act of 1932 (but see *In the Goods of Bolton* (1887) 12 P.D. 202).

(Theobald 4, 5.)

Will — personalty — condition invalid — gift unconditional.—Re Elliott [1952] 1 All E.R. 145. A testator left his residuary estate to an infirmary subject to their applying the income on £100 to the maintenance of his grave in a cemetery. As this gift earmarked a sum of money in perpetuity for a non-charitable purpose it was held that the direction as to the grave was void for perpetuity. In the case of land the entire gift would have been bad, under the rule in *Egerton* v. *Earl Brownlow* (1853) 4 H.L.C. 1. But conditions attached to legacies of personalty are governed by the old ecclesiastical rules. Where the condition was not " malum in se," *e.g.*, a crime, but " malum prohibitum," as merely against public policy, it could be ignored and the infirmary took the residue absolutely. *Re Moore* (1888) 39 Ch.D. 131 was referred to.

(Theobald 435.)

Administration of estates—deficiency—jointures and portioners rank " pari passu."—Re Keele. (See Property Cases.)

Will—capital and income—company profits—sales " ex div." and " cum div."—Re Rudd. (See Property Cases.)

Will — administration — apportionment — rule in Allhusen v. *Whittell* (1867) L.R. 4 Eq. 295.—*Re Ullswater* [1951] 2 T.L.R. 1924; [1951] 2 All E.R. 989. In this case there was the usual direction to treat income of land under a trust for sale as if it were the proceeds of sale of the land, even during the first year after the testator's death. (See 2 K. & E. (14th ed.) 877.) The object of this clause is to exclude the rule in *Howe* v. *Lord Dartmouth*. It was held that it did not exclude the rule in *Allhusen* v. *Whittell*, because designed for another purpose. In the event there was an adjustment, and the testator's debts and interest thereon were deemed payable out of capital plus income on such capital, and not merely out of capital at the date of payment. The life tenant must keep down the interest on debts and is only entitled to the income of the net residue. The report in the Times Law Reports does not give a full reference to 4 Equity. The provisions of L. P. A., 1925, s. 28 (2), were not referred to in the instant case, but appear not to affect it, as they deal with net income after keeping down outgoings.

(Theobald 382.)

Administration—resealing N.I. grant—not retrospective.—Burns v. *Campbell* [1951] 2 T.L.R. 1007. The Court of Appeal here held that the resealing of a grant was not retrospective. *Hilton* v. *Sutton*

Steam Laundry [1946] K.B. 65, C.A., was applied. The intestate died on January 23, 1950. His widow obtained letters of administration in Ireland on January 12, 1951. On January 19, 1951, she issued a writ in the English High Court as administratrix. On March 20, 1951, her grant was resealed by the English court. The 12 months' period under the Fatal Accidents Act, 1846, expired after she issued the writ but before the resealing and it was held that her claim was out of time. She could still sue under the Law Reform Act, 1934, but under less favourable conditions, as administratrix. The widow might have sued as widow under the Fatal Accidents Act six months after the death and the result would then have been different. This is a hard decision but accords with the general policy of construing statutes of limitation strictly.

Will—condition—name of woman.—Re Lewis' Will Trusts. (See *Conveyancer's* Notebook.)

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4. *PLANNING CASES*

By T. A. BLANCO WHITE, Barrister-at-Law

The case of *Cottrell-Dormer* v. *Bristol Corporation* (1951) 2 P. & C.R. 230, illustrates yet another tricky transitional provision of the Town and Country Planning Act, 1947. The corporation obtained authority for the compulsory purchase of some land, belonging to the claimant, which was "ripe for development" when the Act came into force. The "existing use value" of the land, by which compensation for the purchase would under the Act normally be determined, was under £1,000; while its value for development was £16,000. The Act does provide (in section 51 (4)) for the payment of full value for land which was "ripe for development" when the Act came into force, but these provisions only apply (as the corporation pointed out to the claimant) where the landowner has a certificate from the Minister, under section 80 of the Act, that the land is "dead ripe." The claimant therefore proceeded to obtain such a certificate. Since, however, the notice to treat for the purchase was served before the 1947 Act came into force, the transitional provisions applied. These exclude section 51 (4), with the result that the "dead ripe certificate" operated to deprive the claimant of his right to compensation (under Part VI of the Act) for loss of the development value of his land, without entitling him to more than existing use value on the compulsory purchase. He was reduced to arguing that the corporation had disentitled themselves from relying upon the transitional provisions; an argument that not even reference to the famous decision in *Central London Property Trust* v. *High Trees House* [1947] K.B. 130, could persuade the Lands Tribunal to accept.

Marks & Spencer, Ltd. v. *L. C. C.* 2 P. & C.R. 257; [1951] 2 T.L.R. 1139 (*Re 42 Paddington Street, etc.* [1951] 2 All E.R. 1025) decides various points. First, it was lawful under the 1932 Town and Country Planning Act (and presumably is lawful still) to make a grant of planning permission conditional upon the development concerned being commenced and completed within specified periods of time. Though such conditions are lawful, however, the Minister discourages their use otherwise than in special cases (*a*). Secondly, the phrase "works for the erection of a building" in section 78 of the Town and Country Planning Act, 1947 (which relates to buildings unfinished when the Act came into force), does not include works for the demolition of buildings encumbering a site, at least when the demolition and any subsequent building operation are carried out under different contracts. Other preparatory work, however, may bring the case within section 78. The judgment includes a third decision: that there was no obligation under the 1932 Act for a local planning authority to give reasons for imposing conditions upon the grant of planning permission. This third decision does not affect the present position (the present wording is entirely different from that of the 1932 Act), and the less said about it the better.

5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, m.a., of the Inner Temple, Barrister-at-Law

Rent Restrictions Act—section 12 (1) (g) *of* 1920 *Act—meaning of "residing with the tenant"—question of fact for judge—effect of transitory absence.*—The question whether the six-months residence condition (for relatives other than the widow) laid down by section 12 (1) (g) of the 1920 Act is fulfilled is a question of fact for the county court judge. It is not necessary that the relative should be physically living at the place during the whole of the six-months period. For example, a son might still fulfil the condition although absent on national service, a daughter might be training as a probation-nurse, a sailor son might be on a voyage, and either the tenant or the relative might be in hospital, without interrupting the "residence" in the eyes of the law: *Middleton* v. *Bull* [1951] 2 T.L.R. 1010.

(Rent Restrictions Guide, 3rd ed., pp. 17–18.)

Rent control—determination by tribunal under 1946 *Act—fresh reference—no change of circumstances alleged—jurisdiction.*—In *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Gormly* [1951] 2 All E.R. 1030, the Divisional Court held that in a case

(*a*) See the Ministry's Circular No. 58, paras. 17 and 18 (Encyclopædia of Planning Law, Vol. I, p. 1489).

where no change of circumstances was alleged, a rent tribunal had no jurisdiction to reduce a rent previously fixed by the tribunal, under the Furnished Houses (Rent Control) Act, 1946, although the application was made by a new tenant. The rent originally fixed by the tribunal was not fixed for a limited period only. The determination and registration of the rent operated *in rem*, in the sense that it was not effective only for a particular tenancy. The decision in *Lazarus-Barlow* v. *Regent Estates Co., Ltd.* [1949] 2 K.B. 465, did not throw any doubt on this point.

(Rent Restrictions Guide, 3rd ed., pp. 117–121.)

Landlord and Tenant Act, 1927—*claim for compensation for goodwill and in the alternative for a new lease—failure to state amount in claim—R.S.C., Ord.* 53D, *r.* 1—*fatal to claim for compensation but not to claim for new lease.*—In *British and Colonial Furniture Co., Ltd.* v. *William McIlroy, Ltd.* [1952] 1 All E.R. 12, Donovan J. decided, on a preliminary issue, some points of interest under the Landlord and Tenant Act, 1927. The plaintiffs claimed compensation for goodwill or a new lease. Their notice of claim, served within one month from the service of the landlords' notice to quit, did not state the amount of compensation claimed, thus failing to comply with section 4 (1) of the 1927 Act and R.S.C., 53D, r. 1 (1). The amount was, however, stated in the originating summons, which was taken out more than a month after the landlords' notice. Donovan J. held (1) that the claim for compensation was bad. Even if the notice of claim and the summons could be read as one document, as the latter was taken out more than a month after the notice to quit it would not be correct to do so for the purpose of defeating the statutory time limit. Further, even if the claim could be regarded as a pleading, it would not be right to allow it to be amended by the insertion of the amount, so as to take away the landlords' immunity from paying compensation. (2) The claim for a new lease could proceed, however. Section 5 (3) (a) does not mean that the tenant must prove that he *is* in fact entitled to compensation, having fulfilled all the procedural conditions, but merely that he would be so entitled *if* he fulfilled them.

(Woodfall, 24th ed., p. 1078.)

Agricultural Holdings Act, 1948—*transitional provisions—notice to quit served before March* 1, 1948—*substantive and procedural provisions of* 1923 *Act applicable.*—In *Gulliver* v. *Catt* [1952] 1 T.L.R. 6, a notice to quit an agricultural holding was served before March 1, 1948, although the defendant did not quit until 1952. As the notice was served before March 1, 1948, it was clear from section 99 of the Agricultural Holdings Act, 1948, that the provisions of the 1948 Act relating to compensation did not apply, but that the matter was regulated by the Agricultural Holdings Act, 1923. Section 10 of the latter Act does not, as does section 57 of the 1948 Act, postpone the landlord's claim for breaches of repairing covenants until the termination of the tenancy. Consequently the landlord's

claim was not one which under section 70 of the 1948 Act arose "on or out of the termination of the tenancy" and had not, therefore, to be referred to arbitration. The claim was thus within the jurisdiction of the court, and Barry J. referred it to an official referee. He reached this conclusion without having to decide whether the words in section 99 of the 1948 Act—"provisions relating to compensation"—covered not merely the substantive provisions but also the procedural provisions as to the determination of compensation, such as section 70. He did, however, in fact hold that these words covered both substantive and procedural provisions. In deciding that they covered procedural provisions he settled a point which has been in some doubt, in view of section 70 (6), which suggests that section 70 applies if the tenancy terminates on or after March 1, 1948, even if the notice to quit was given before that date. The decision is, accordingly, that if a notice is served before March 1, 1948, the substantive provisions of section 10 of the 1923 Act, and the procedural provisions of section 16 of that Act, are applicable. Section 16 is, of course, the section which became renowned as a result of the decisions in *Lowther* v. *Clifford* [1927] 1 K.B. 130, and *Olive* v. *Paynter* [1932] 2 K.B. 666, and, finally, *Preston* v. *Norfolk County Council* [1947] 1 K.B. 775. (Jackson's Agricultural Holdings, 10th ed., pp. 193–195)

Nature of a licence to occupy—distinguished from tenancy at will—licence not revocable at will—licensee's right to exclusive possession.—The decision of the Court of Appeal in *Errington* v. *Errington* [1952] 1 All E.R. 149, is a difficult one. Recently Mr. R. E. Megarry, in a masterly article in the Law Quarterly Review (October, 1951, pp. 505–521) discussed, among other decisions, that of *Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 All E.R. 271, where the nature of the daughter's interest, whether called a licence or an interest *sui generis*, seemed to be in conflict with established ideas. What is an interest which confers exclusive possession, but has not the other characteristics of a tenancy, such as assignability? It is, like a statutory tenancy, "*monstrum horrendum informe ingens*", but it is surprising to find the common law producing a monster of this kind. The aberrations of statute law are taken for granted, but is not the common law the perfection of reason? The transaction in *Errington's Case* was as follows. A father bought a house through a building society as a home for his son and daughter-in-law. He put down £250 in cash and borrowed the remainder from the building society, the loan being repayable with interest in weekly instalments. The house remained in the father's name and he remained legally liable for the instalments. He agreed with the son and daughter-in-law, however, that they could occupy the house and that if they paid the building society instalments until the mortgage was paid off the property would be theirs. The daughter-in-law in fact continued to pay the instalments from that time until the present action, but there remained at the date of the action some further instalments still to be paid before the loan would be discharged. The father died and later differences arose between the son and his wife and the son left the wife. The father's widow, to whom all the father's property had

been left by his will, claimed possession of the house from the daughter-in-law, who had continued to reside in it. It was held (1) that the son and daughter-in-law were not tenants at will, as the relationship was not determinable on demand; (2) that they were not tenants at a rent, because there was no legal obligation on them to pay the instalments, even if these payments (to a third party) could be regarded as rent; (3) that they were not bare licensees whose licence was revocable at will; that they were licensees for value, with a contractual or equitable right to remain in possession so long as they paid the instalments—a right which, in the fullness of time, would grow into a good equitable title to the house itself. Denning L.J., in the course of his judgment, criticises the usual test for distinguishing a licence from a tenancy, namely, that the licensee has not got exclusive possession. There is a type of licensee, exemplified in the requisitioning cases, in *Foster* v. *Robinson* [1951] 1 K.B. 149, and in *Marcroft Wagons, Ltd.* v. *Smith* (*supra*), who has got exclusive possession. The House of Lords in *Winter Garden Theatre* (*London*), *Ltd.* v. *Millennium Productions, Ltd.* [1948] A.C. 173, showed that a licensor will not be allowed to eject a licensee in breach of a contract to allow him to remain, leaving him to a remedy in damages for breach of contract.

Is this a new interest in land ? Has the anxiety of the Court of Appeal to do justice in individual cases led to the making of some dubious law, or is this suggestion merely a symptom of a narrow-minded and reactionary outlook on the part of the critic.

(Woodfall, 24th ed., p. 10.)

Landlord and tenant—oral variation of lease under seal—rule.—In *Mitas* v. *Hyams* [1951] 2 T.L.R. 1215, the Court of Appeal affirmed the present-day rule, binding both in law and in equity, that a lease under seal can be varied by an agreement in writing, or even by an oral agreement if the latter is evidenced in writing or has been partly performed, in contrast with the old rule at common law that a document under seal could only be varied by another document under seal. Denning L.J. characteristically regarded the court's decision as an application of the doctrine in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 130.

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6. *REVENUE CASES*

By DESMOND MILLER, of the Inner Temple, Barrister-at-Law

Note :—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).

(a) Income Tax

Gospel and Another v. *Purchase* [1951] 2 All E.R. 1071; [1951] T.R. 353 (H.L.).

(1) *Statutory provisions*: Cases II, III and VI of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Remuneration earned in the course of a profession but not paid until after the earner's death was not assessable in the hands of his executors. Although there was some element of periodicity in the payments they were in origin and remained professional earnings which could only be assessed under Case II of Schedule D.

(3) *Facts and Decision*: The deceased, the well-known actor and producer, Mr. Leslie Howard, in the course of his profession entered into the following contracts:—

Contract A made between the deceased and British National Films, Ltd., on October 31, 1940, whereunder the deceased assigned the story and script to the company and agreed to act in and produce a film based thereon.

He was to be paid £5,000 during production and a specified proportion of the gross receipts from distribution, as they came in.

Contract B made between the deceased and Ortus Films, Ltd., on December 13, 1940, whereunder the deceased agreed to act in a specified film. He was to be paid £2,000 and a sum equal to 14/49ths of the company's share in the ultimate net profits of the distribution of the film.

Contract C made between the deceased and Misbourne Pictures, Ltd., on September 18, 1940, whereunder the deceased agreed to act in a specified film. The agreement was subsequently varied and under the terms as so varied the deceased was to be paid the sum of £11,000 by four equal instalments of £2,000 each, by December 31, 1943, 1944, 1945 and 1946, respectively, and a final instalment of £3,000 payable by December 31, 1947, together with a sum equal to 2/3rds of the sums from time to time received by the company in respect of the exploitation of the film, in excess of £11,000.

The deceased fully performed all services required of him under the several contracts prior to his death, which occurred on June 1, 1943.

Subsequent to the death amounts were received by the executors as follow:—

Under Contract A—during the years 1944–45, 1945–46 and 1946–47, sums representing the specified proportion of gross receipts due to the deceased.

Under Contract B—during the years 1944–45 and 1945–46, sums on account of the deceased's 14/49ths share of the ultimate net profits.

Under Contract C—during the years 1944–45 and 1945–46, sums on account of the deceased's 2/3rds proportion, together with instalments of the lump sum of £11,000.

All payments were made in full without any deduction for income tax.

Assessment to income tax was made upon the deceased's executors for the years 1944–45, 1945–46 and 1946–47, in respect of the instalments of the lump sum, and the periodical payments arising from the exploitation of the various films, received by them during these years. The assessments were made under Case III or alternatively Case VI, of Schedule D.

Held:—

(i) the source of the payments to the executors was the professional activity of the deceased and that source did not change by reason of his death. As a consequence assessment could not be made under Case III or Case VI of Schedule D, *supra*.

(ii) As a result of the death assessment could no longer be made under Case II of Schedule D, *supra*. *Bennett* v. *Ogston* 15 T.C. 374 applied.

The Crown's claim accordingly failed.

Re Lyons; *Barclays Bank, Ltd.* v. *Lyons and Others* [1952] 1 All E.R. 34 (C.A.).

(For facts and decision, see *The Conveyancer*, vol. 15, pp. 367–8.)

The Court of Appeal unanimously upheld the decision of Romer J. *Re Kingcome* [1936] Ch. 566 considered and applied.

Faulconbridge v. *Thomas Pinkney & Sons, Ltd.* [1951] T.R. 365 (Ch.D.).

(1) *Statutory provisions*: Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: The Commissioners' findings on issues of fact are final only where there is evidence to support those findings.

(3) *Facts and Decision*: Under written agreement made in 1945 two directors, being the majority shareholders of a private company, agreed with the remaining directors (i) to sell their shares to the remaining directors at a price of £2 per share, and, (ii) to resign their offices as directors of the company forthwith. As consideration for the resignation the remaining directors jointly and severally undertook;

> "to make arrangements to pay to the said . . . (the retiring directors) . . . 50 per cent. of all commission on new contracts, sales, charters, options, auctions and valuation fees received by the company in excess of £2,250 during each of the years ended October 31, 1946, to October 31, 1950, inclusive."

In pursuance of the agreement the directors retired and the shares were duly transferred and paid for.

Under agreement in writing, dated August, 1947, and expressed to be supplemental to the agreement of 1945, it was declared "for the sake of clarity" that the payments to be made to the retiring

directors, as required by the 1945 agreement, were to be made by the company.

The company was not a party to either agreement.

In computing its profits for the year of assessment 1948–49, the company claimed to deduct the sum of £6,122 paid to the retiring directors, under the 1945 agreement on the ground that it was a payment for services. The Commissioners accepted evidence that valuable services had been rendered to the company by the directors after their retirement and found that the payment had been made by the company in consideration of these services.

Held:—there was no evidence before the Commissioners either that—

(i) the company had agreed to remunerate the retiring directors for services after retirement; or

(ii) that the company had ever agreed to undertake the remaining directors' liabilities under the 1945 agreement.

The Commissioners' determination was accordingly reversed.

Wilkie v. *C. I. R.* [1952] 1 All E.R. 92; [1951] T.R. 371 (Ch.D.).

(1) *Statutory provisions*: Section 39, the Income Tax Act, 1842; section 3, the Interpretation Act, 1889; Rule 2 of the Miscellaneous Rules applicable to Schedule D, the Income Tax Act, 1918.

(2) *Point*: (i) the words "six months" in Rule 2, *supra*, mean six calendar months and not six lunar months; (ii) to determine the actual period during which a person was resident in the United Kingdom, for the purposes of Rule 2, the number of days' actual residence must be added together; (ii) when it transpires that such a person was present in the United Kingdom for part of a day or days, the rule requires and it is proper to reduce such fractions to hours; (iv) finally, the total period of residence is to be expressed in hours and the determination then made whether such period amounts to a greater or less number of hours than there are or were in six calendar months of the year in question.

Green v. *Cravens Railway Carriage and Wagon Co., Ltd.* [1951] T.R. 377 (Ch.D.).

(1) *Statutory provisions*: Rule 3 (f) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: A lump sum in commutation of a company's future liability to make annual premium payments pursuant to a staff assurance scheme is an admissible deduction in computing the trading profit of the year in which payment is made. *Anglo-Persian Oil Co., Ltd.* v. *Dale* 16 T.C. 253 applied; *Atherton* v. *British Insulated and Helsby Cables, Ltd.* 10 T.C. 155 distinguished.

Chibbett v. *Harold Brockfield & Son, Ltd.* [1951] T.R. 383 (Ch.D.).

(1) *Statutory provision*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: The rule in *John Cronk & Son, Ltd.* v. *Harrison* [1937] A.C. 185 applied.

(3) *Facts and Decision*: The appellant company was engaged in business as builders and contractors. During the period 1934 to 1939, deposits were made with a building society as consideration for the advance by the society, to purchasers from the company, of sums in excess of the amounts normally available on mortgages of the type of house in question. The deposits were in fact a guarantee for the performance by the mortgagors of their covenants as to repayment. The company went into voluntary liquidation on November 28, 1946, and ceased to trade at that date. No valuation of the deposits was made at the time or times of sale of the houses, nor up to the date of liquidation had any sums been included in the profits of the company in respect of any such valuation.

The deposits were eventually released on May 8, 1947, six months after the discontinuance of the company's trade.

The Revenue claimed that the deposits should be brought into account at their face value, as trading receipts of the period ending November 28, 1946. The Special Commissioners found that the deposits were worth their face value during the company's final trading period, but held that the method laid down in *John Cronk & Son, Ltd.* v. *Harrison, supra,* namely, that deposits of this nature should if possible, be valued at the time of sale (of each relevant house) but otherwise must be brought into account whenever released, should be followed.

Held (affirming the Special Commissioners' determination), the deposits were not receipts of the last trading period.

Blunson v. *West Midland Gas Board* [1951] T.R. 385 (Ch.D.).

(1) *Statutory provisions*: Section 15, the Finance Act, 1938; sections 2 and 7 (3), the Income Tax Act, 1945.

(2) *Point*: The question whether a building or buildings is (or are) "mills factories or other similar premises" within section 15, *supra,* is an issue of fact for the Commissioners, but in considering whether a number of buildings constitute a "mill or factory" they must not take each individual building separately but must consider the part it plays in the entire manufacturing process.

Elleker v. *Union Cold Storage Co., Ltd.* [1939] 1 All E.R. 23 considered.

Thomas v. *Marshall* [1952] 1 All E.R. 173; [1951] T.R. 395 (Ch.D.)

(1) *Statutory provision*: Section 21, the Finance Act, 1936.

(2) *Point*: The aggregate income referred to in subsection (4) of

section 21, *supra*, is the aggregate of the income arising under all settlements (in favour of the infant) to which section 21 applies.

(3) *Facts and Decision*: From time to time a father had placed various sums to the credit of two Post Office Savings Bank accounts opened by him in the names and for the benefit of his two infant children; the father had also bought Defence Bonds for each of the children. The sums of money and the bonds were absolute gifts.

The Revenue assessed the parent upon income arising from the deposits and the bonds under section 21 (1) of the Finance Act, 1936.

The parent taxpayer appealed on the grounds:

(i) that the gifts of money and the bonds being absolute gifts were not in consequence "settlements" as defined by section 21, *supra*, and, alternatively,

(ii) that as the interest arising from each separate sum placed to the credit of the respective child's Post Office Savings Bank account did not exceed £5 per annum, it was exempt, under the provisions of subsection (4) of section 21, *supra*, and was not therefore required to be treated as income of the parent taxpayer.

Held:—

(i) that the gifts of money and bonds although absolute gifts, were "settlements" as defined by section 21 of the Finance Act, 1936. *Hood Barrs* v. *C. I. R.* [1946] 2 All E.R. 768 applied.

(ii) (reversing the Commissioners' determination) that in determining whether the aggregate of the income paid to or for the benefit of any one child exceeded £5 per annum, for the purpose of the exemption under section 21 (4), the income arising by virtue of all settlements to which section 21 applied must be aggregated.

(b) Estate Duty

Re Rose (deceased); *Rose* v. *C. I. R.* [1951] 2 All E.R. 959; [1951] T.R. 331 (Ch.D.).

(1) *Statutory provisions*: Section 2 (1) (c), the Finance Act, 1894.

(2) *Point*: A gift of shares is complete for estate duty purposes, when the relevant transfer has been signed by the donor. The five-year period therefore runs from the date of execution of such transfer and not from the date of registration by the company.

(3) *Facts and Decision*: By transfer executed on March 30, 1943, the deceased transferred (*inter alia*) 10,000 shares of £1 each in the capital of a private company, to his wife, by way of gift.

The deceased was governing director of the company and as such had wide powers including the power, at his discretion, to refuse to register any transfer of shares.

The transfers were not registered by the company until June 30, 1943, and as the deceased died on February 16, 1947, it was conceded that unless the gift were completed before April 10, 1943 (so as to be within the transitional provisions of section 47 and Part II of the Eleventh Schedule to the Finance Act, 1947) the shares must be

deemed to pass at the death and to be chargeable with duty pursuant to section 2 (1) (c) of the Finance Act, 1894.

Held:—

(i) on execution of the transfer the donee acquired the whole beneficial interest of the deceased in the shares;

(ii) from the date of transfer therefore the donor would, if necessary, have been compelled by the court to make effective the beneficial interest of the donee;

(iii) for estate duty purposes the gift was accordingly complete at the date upon which the transfer was executed.

The Crown's claim to duty accordingly failed.

Re Beit's Will Trusts; Beit v. *C. I. R.* [1951] 2 All E.R. 1002; [1951] T.R. 337 (C.A.).

(For facts and decision see *The Conveyancer*, vol. 15, pp. 293–4.)

The Court of Appeal unanimously upheld the decision of Vaisey J. Leave to appeal to the House of Lords granted.

Re Lambston's Marriage Settlement; May and Another v. *C. I. R.* [1952] 1 All E.R. 162; [1951] T.R. 391 (Ch.D.).

(1) *Statutory provisions*: Section 5 (3), the Finance Act, 1894; section 48, the Finance Act, 1938.

(2) *Point*: Where settled property passes under section 1 of the Finance Act, 1894, the exemption accorded by section 5 (3)—*ibid.* (as amended by section 48 of the Finance Act, 1938) is not available.

(3) *Facts and Decision*: By marriage settlement made in 1912 the husband settled property upon trust;

(i) during the joint lives of husband and wife to pay an annuity of £400 per annum to the wife, with the balance of income to the husband;

(ii) the income of the whole to be paid to the surviving spouse during his or her life;

(iii) subject to the spouses' life interests, remainder to the issue of the marriage absolutely.

The husband died in 1949, leaving the wife surviving, and on his death the Crown claimed duty on the entirety of the settled fund under section 1 of the Finance Act, 1894. The trustees maintained that on the principle laid down in *Att.-Gen.* v. *Glossop* [1907] 1 K.B. 163, the whole of the funds did not pass, but only their value less so much as was required by its income to produce the wife's annuity of £400 per annum.

Held:—

(i) the husband's death occasioned a change in the beneficial title to the income of the settled property as a whole, and as a consequence the whole passed under section 1 of the Finance Act, 1894;

De Trafford v. *Att.-Gen.* [1935] A.C. 280 applied.

(ii) the failure of the husband's contingent interest in that part of the income represented by the wife's annuity, by reason of his death, did not occasion the passing of the settled property, which passed under section 1, *supra*, and not under section 2 of the Act of 1894. As a consequence no exemption could be obtained under section 5 (3) of the Finance Act, 1894, as amended.

Att.-Gen. v. *Glossop* [1907] 1 K.B. 163 explained.

THE LIBRARY

Ranking, Spicer and Pegler's Executorship Law and Accounts. Eighteenth edition. By H. A. R. J. Wilson, F.C.A., F.S.A.A. London: Sir Isaac Pitman & Sons, Ltd. 427 pp. and Tables of Contents, Cases, Statutes and Rules and Index. (30s.).

The popularity in certain quarters of this well known guide to executors and their advisers is indicated by the appearance of this new edition as usual only three years after the previous one. It is far more familiar to accountants than to solicitors, who will still say that the accounts and methods recommended are far too complex and expensive for practical use. We have had personal experience of accounts kept in accordance with this system and have found them extremely cumbrous and difficult to follow. What solicitors want, and will seek in vain in this book, is a simple way of presenting to beneficiaries accounts which can be readily followed by those who are not trained in accountancy. We would suggest that in a future edition it would be helpful to include a specimen account or statement suitable to be delivered to a beneficiary.

There is a considerable number of subjects dealt with in too little space to be of real value to a practitioner. It is impracticable to deal fully in 29 pages with the making of wills, intestacy, legitimation and adoption (the subject-matter of Chapter I) and, although the chapter on death duties is considerably fuller, even 80 pages is too short to contain more than a general guide. The new chapter on trusts and trustees is a useful addition to the book, but might well be limited to trusts created by will.

The most useful section of the book for solicitors is the chapter on apportionment, which sets forth with admirable clarity the many difficult rules on this subject with full examples of their application. Whether or not the suggested ledger accounts are adopted, the actual calculations are an excellent guide through a rather tangled jungle.

This book is well printed in large, clear type and is got up in a most attractive manner. There are a certain number of mistakes, some of them due to rearrangements from previous editions which have not been completed quite carefully enough, and also some instances of changes in practice which have not been noted.

J. H. G.

First Supplement to the Eleventh Edition of Dymond's Death Duties. London: Solicitors' Law Stationery Society, Ltd. (5s.).

If we are to have supplements at half yearly intervals, it is not after all the fault of the learned authors. The judgments of the House of Lords in the *St. Aubyn Case* (*per* Lords Simonds and Radcliffe) show pretty clearly where the fault lies, and it is indeed to be hoped, on many grounds, that the Finance Act, 1940, will soon be repealed and replaced by some more intelligible and equitable measure.

In the meantime the supplement—which brings the text of the eleventh edition up to August 31, 1951—contains an excellent analysis of the more recent decisions of the Court of Appeal and House of Lords in, for instance, *St. Aubyn* (*No.* 2), *D'Avigdor-Goldsmid* and *Re Payton,* to quote a few.

Apart from bringing the case law as stated in the eleventh edition up to date, the supplement also contains some useful practice notes and the text (so far as relevant to Estate Duties) of the Finance Act, 1951.

D. M.

We have also received the following:—

Jarman on Wills. Eighth Edition, three vols. Edited by Raymond Jennings, K.C., and John C. Harper, Barrister-at-law. 1951. London: Sweet & Maxwell, Ltd. 2097 pp. £13 13s.

Covenants affecting Land (*Supplement*). By Sir Lancelot H. Elphinstone. 1951. London: The Solicitors' Law Stationery Society, Ltd. 16 pp. (3s 6d.).

Landlord and Tenant. Third Edition. By R. Borregaard, M.A., Barrister-at-law. "This is the Law" Series. 1951. London: Stevens & Sons, Ltd. 94 pp. (6s.). A short new chapter on the Leasehold Property (Temporary Provisions) Act, 1951, has been added and the text has been brought up to date.